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No. 06-

IN THE

Supreme Court of the United States

MCGLADREY & PULLEN, LLP,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court reviewing a state professional regulatory board's decision that prohibits allegedly misleading commercial speech should review the record *de novo* to determine whether the speech is misleading and the prohibition is constitutional.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

Petitioner McGladrey & Pullen, LLP, has no parent company, and no publicly held company owns 10 percent or more of petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner McGladrey & Pullen, LLP, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

OPINIONS BELOW

The per curiam affirmance of the Supreme Court of North Carolina was entered on April 7, 2006, and is included in the Appendix ("App.") at 1a. It has been officially reported and can be found at *McGladrey & Pullen, LLP* v. *North Carolina State Board of Certified Public Accountant Examiners*, 627 S.E.2d 461 (N.C. 2006). The opinion of the Court of Appeals of North Carolina was entered on July 19, 2005, and is included in the Appendix at 2a-16a. That opinion has also been reported and can be found at *McGladrey & Pullen, LLP* v. *North Carolina State Board of Certified Public Accountant Examiners*, 615 S.E.2d 339 (N.C. Ct. App. 2005). The order

of the Superior Court of Wake County was entered on March 18, 2004, and is included in the Appendix at 17a-20a. The declaratory ruling of the North Carolina State Board of Certified Public Accountant Examiners was entered on April 28, 2003, and is included in the Appendix at 21a-24a.

JURISDICTION

The Supreme Court of North Carolina entered its opinion and judgment on April 7, 2006. On June 23, 2006, the Chief Justice extended the time for filing this petition up to and including August 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Amendment I of the United States Constitution provides, in pertinent part, as follows, "Congress shall make no law ... abridging the freedom of speech."

Title 21, section 8N .0307(a)-(b) of the North Carolina Administrative Code provides, in pertinent part, as follows:

> (a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive.... The name of a non-CPA owner in a CPA firm name is prohibited.
>
> (b) Style of practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA owner may have as a part of its name the words

"associates," "group," or "company" or their abbreviations....

STATEMENT OF THE CASE

A. Nature Of The Case.

Petitioner, a leading national accounting firm, seeks to change its name from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." This change is designed to reflect McGladrey's affiliation with RSM International, Inc. ("RSMI"), an international affiliation of accounting and consulting firms, and to identify it clearly as a CPA firm within the broader organization. Petitioner requested approval of this change from the relevant professional regulatory boards in every state in which petitioner was doing business, including respondent, the North Carolina State Board of Certified Public Accountant Examiners ("Board"). North Carolina alone rejected the change. After a hearing in which it called no outside witnesses and produced no evidence for its position, the Board rejected the name change because it concluded that the proposed name "has the capacity or tendency to deceive." App. 24a.

Faced with this restriction on the right to communicate its affiliation with RSMI through its brand, petitioner sought judicial review. The North Carolina trial court and Court of Appeals affirmed the Board based on the highly deferential standard of whether "substantial evidence" supported the finding regarding deception. The Supreme Court of North Carolina affirmed without opinion.

This petition seeks review of the North Carolina courts' decision to review the Board's ruling only for "substantial evidence" instead of conducting *de novo* review to determine whether the record supports the restriction on petitioner's commercial speech. Specifically, the court of appeals held that the Board's decision should stand if it was supported by

evidence with which a "reasonable mind" might agree, even if the court would have held otherwise. Such highly deferential review conflicts with decisions of other state supreme courts and this Court, and inadequately protects First Amendment rights. If allowed to stand, this ruling would mark a dramatic break with this Court's longstanding recognition of the role that vigorous judicial review plays in preserving free speech, including commercial speech rights. The absence of meaningful judicial review in cases involving restrictions imposed by state professional regulatory boards is especially harmful because the decisionmakers often are competitors of the entity seeking to gain an advantage by changing its name. Thus, such a board may have a parochial interest in restricting the flow of commercial speech that is a critical component of our free market.

B. Petitioner's Exercise Of Its First Amendment Right To Establish And Promote A Brand.

Petitioner is a national CPA firm with offices across the country, including nine in North Carolina. Petitioner has specialized in providing attest services to mid-sized companies. Its recent growth has positioned it as a strong competitor of the "Big Four" accounting firms in the marketplace for attest services and has raised its profile with major regulators, bankers and investment bankers. "Attest services" include audits, reviews, and compilations of financial statements. See 21 N.C. Admin. Code 8A .0301(b)(5). The term "audit" is sometimes also used to describe certain non-attest services frequently performed by non-CPAs (*e.g.*, "internal audits"). Nonetheless, an audit of a set of financial statements that results in the expression of an opinion as to whether those financial statements have been prepared in accordance with generally accepted accounting principles must be performed by a licensed CPA. See *id.* 8A .0301(b)(6).

In 1999, with the Board's permission, petitioner, which provides attest services, affiliated with RSM McGladrey, Inc.,

a national consulting and tax advisory firm that does not perform attest services (a "non-attest firm"). Collectively, RSM McGladrey, Inc. and petitioner represent the fifth largest accounting and consulting organization in the country with revenues in excess of $1 billion and more than 100 offices nationwide. Petitioner expects to continue its growth and seeks to attract more large, complex, and internationally active clients.

Petitioner and RSM McGladrey, Inc., are both affiliates of RSMI, an affiliation of approximately 100 accounting and consulting firms from 80 countries around the world. Each affiliated firm in the RSM organization is independently operated, and must meet the high standards of RSMI before it is allowed to use the RSM brand. The "RSM" brand is derived from the first initials of the three major accounting firms that founded the RSMI affiliation: Robson Rhodes, LLP, a United Kingdom partnership, Salustro-Reydel, a French accounting firm, and McGladrey & Pullen, LLP.

Petitioner determined in 2002 that it could better inform the public of its affiliation with RSMI and the nature of its services by changing its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Adopting the RSM brand would allow petitioner to compete in the global marketplace by announcing its affiliation with an international organization known for high standards of quality and integrity. Moreover, by adding "Certified Public Accountants" to its name, petitioner sought to announce that, unlike other RSM entities, it could perform attest services, including financial statement audits, in the United States.

C. The Speech Value Of Branding.

A commercial brand name performs multiple functions for companies and consumers. Among other things, a brand enables a consumer to identify the particular good or service being offered; reduces decision costs by facilitating brand loyalty; provides an assurance of consistent quality no matter

where the service is purchased; and enables continuity for a customer that seeks to enjoy a long-term relationship of familiarity with the brand. See Jean-Noël Kapferer, *The New Strategic Brand Management* 23 & tbl.1.5 (2004); Pingjun Jiang, *The Role of Brand Name in Customization Decisions: A Search vs. Experience Perspective*, 13 J. Prod. & Brand Mgmt. 73, 79 (2004). The signaling function of a brand name is critical, because "[c]onsumers treat a brand name as a useful heuristic, or as a proxy for quality determining attributes." Jiang, *supra*, at 79; see also Paul A. Argenti & Bob T. Druckenmiller, Tuck School of Business Working Paper 03-13, *Reputation and the Corporate Brand* 4 (2003), *at* http://ssrn.com/abstract=387860 (noting that a corporate brand "provides consumers with expectations of what the company will deliver"). "Brand equity"—one key component of which is brand awareness—is a "core concept" in marketing. See Pieter Vijn & Frank Verbeeten, NRG Working Paper 06-03, *Do Strong Brands Pay Off? An Empirical Investigation of the Relation Between Brand Asset (TM) Valuator and Financial Performance* 5 (Jan. 2006), *at* http://ssrn.com/abstract=896703. Petitioner is in the process of branding itself as "RSM McGladrey & Pullen, LLP, Certified Public Accountants," to communicate quality, consistency, and continuity to consumers seeking attest services in North Carolina, throughout the United States, and (through its affiliation with RSMI) around the world.

A brand has unique speech effects in the auditing context. In the auditing world, a brand is not only a signal to a prospective client, but also a signal to those who would deal with that client. Audit clients frequently publicize and capitalize on an auditor's brand when they use the auditor's reports for filings with the Securities and Exchange Commission. Clients also benefit from the auditor's reputation for providing independent review of their financial statements when clients are dealing with potential lenders, investors, customers, or vendors. An auditor's brand carries

with it the auditor's reputation for probity and analytic rigor; the more widely known the auditor's brand, the more valuable the reputational effect. A company purchasing audit services thus pays in part for the auditor's brand and the information it conveys; indeed, "[t]he value of an audit ... depends upon the reputation of the accounting firm performing the audit." Michael Firth, *Auditor Reputation: the Impact of Critical Reports Issued by Government Inspectors*, 21 RAND J. Econ. 374, 386 (1990).

Petitioner's proposed brand name also alerts prospective clients that they have access to a wide range of global service providers, all of whom, as affiliates of RSMI, have been prescreened for quality. For example, an American company that wishes to engage auditors for its domestic and British operations would save time, reduce search costs, and limit concerns about corporate compatibility if it knew that it could engage RSM-affiliated entities in both locations to perform those services. Moreover, a global brand communicates increased quality and prestige. Jan-Benedict E.M. Steenkamp et al., Working Paper, *How Perceived Brand Globalness Creates Value* 21 (June 20, 2002), *at* http://ssrn.com/abstract=339365.[1] Communicating with the public through the international "RSM" brand would thus allow petitioner to receive all of the benefits of an international organization without the need and added expense of trying to establish its own presence in each of the 80 countries currently served by RSM affiliates.

Indeed, the importance of brand names is amply demonstrated by the fact that petitioner's competitors have branded themselves. One study has concluded that the ability of the then "Big Six" accounting firms to charge a premium

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[1] Branding also serves as a guarantee of quality, for affiliates who fail to live up to the standards of the brand will either be improved or removed in order to prevent corrosion of the brand for the other affiliates. This is particularly true for companies that, like petitioner, operate in the business-to-business market. *See* Argenti & Druckenmiller, *supra*, at 6-7.

was due to the power of their brand names. See Sati P. Bandyopadhyay & Jennifer L. Kao, *Competition and Big-Six Brand Name Reputation: Evidence from the Ontario Municipal Audit Market* (Jan. 6, 2000), *at* http://ssrn.com/abstract=233398. More recent literature has discussed whether the brand value of the now "Big Four" accounting firms could help those firms to hold off challenges from the next tier of accounting firms, such as petitioner. See Larry Schlesinger, *Insider: Battle of the Brands*, Accountancy Age, Jan. 14, 2004, at 13, *available at* http://www.accountancyage.com/accountancyage/features/2040288/insider-battle-brands. Petitioner's communication with the public through the internationally-known "RSM" brand name is thus vital to competing with the "Big Four" in the United States.

Numerous accounting firms are associated with non-attest firms that share their brands. Deloitte & Touche LLP provides auditing services while numerous non-attest companies provide a variety of services under the Deloitte brand, including Deloitte Consulting LLP and Deloitte Tax LLP. Moreover, through an international association similar to RSMI, these domestic Deloitte companies are associated with the standards of other firms practicing under the Deloitte brand around the world. Other brands, such as BDO Seidman, Ernst & Young, KPMG, and Dixon Odom, are also shared by attest and non-attest companies in North Carolina and elsewhere.

D. The Board's Refusal To Allow The Name Change.

By letters to petitioner dated October 1, 2002, and January 3, 2003, Robert N. Brooks, the executive director of the Board, informed petitioner that its name change would not be allowed because of the possibility that non-attest firms using "RSM" in their name might be confused with "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Petitioner then submitted to the Board a request for a declaratory ruling on the name change. On April 28, 2003,

the Board held a hearing during which no witnesses, other than Mr. Brooks and petitioner's managing partner, were heard, and no evidence was put into the record. Counsel for the Board stated that "we're not insinuating[] that the petitioner is trying to deceive someone," and one of the Board members stated that whether the proposed name is "deceitful or not, we didn't—we don't believe that. It's just that it gets caught in the language of our rules more than anything else."

After the hearing, the Board issued a declaratory ruling finding that the proposed name violated North Carolina Admin. Code Rules 8N .0307(a) and (b), which regulate the permissibility of names for North Carolina CPA firms. Despite the previous indications that petitioner's proposed name was not deceitful, the Board concluded that the proposed name could be deceptive in two ways: 1) by the public incorrectly concluding that "RSM" is a certified public accountant who is one of petitioner's partners; or 2) by the public incorrectly concluding that any entity using the "RSM" brand may practice public accounting (a problem the Board concluded was not alleviated by petitioner's proposal to distinguish itself from other RSM entities by adding "Certified Public Accountants" to its name). App. 21a-24a.

Support for the finding of deception was thin. First, the Board claimed that its "records" indicated that some of petitioner's own licensed staff members had been "confus[ed]," App. 24a, but the Board failed to provide any such records. Second, the Board cited *Hoover's Company Capsule Database* for the proposition that RSM McGladrey, Inc. "is closely associated with the Petitioner." *Id.* at 22a. That database, however, makes clear that RSM McGladrey, Inc. performs "non-attest" services and that petitioner performs "audit and attest" services. The declaratory ruling did not name even one person who had actually confused RSM McGladrey, Inc. with petitioner (much less that any harm ensued), despite the fact that the firms have been affiliated since 1999. Nor did the Board provide any

evidence that anyone had been confused by other brand names shared by attest and non-attest firms in North Carolina and around the world, such as Deloitte, BDO Seidman, Ernst & Young, KPMG, and Dixon Odom.

E. The Judicial Decisions Below.

Petitioner filed a Petition for Judicial Review of the declaratory ruling with the Superior Court of Wake County. The trial court, after determining "whether there was substantial evidence to support the Declaratory Ruling," App. 17a-18a, affirmed the ruling and held "that regulation of a fictitious brand trade name by a state is appropriate because the potential for public deception outweighed the interest of Commercial Free Speech." *Id.* at 19a. The trial court cited no evidence to support its apparent conclusion that petitioner's proposed name change was potentially deceptive.

On appeal, petitioner contended that the North Carolina Court of Appeals should review the record before the Board *de novo* when evaluating the Board's restriction on petitioner's commercial speech. The Board emphasized its belief that the critical question of whether petitioner's proposed speech was misleading should be reviewed for "substantial evidence."

The court of appeals held that under North Carolina law, a "'Court cannot overturn the [Board's] decision if supported by substantial evidence.'" App. 5a-6a. The court held that "substantial evidence" review prevented it from substituting its judgment for that of the agency, so long as the agency's decision was supported by "evidence a reasonable mind might accept as adequate." *Id.* at 5a (internal quotation marks omitted).

The "evidence" that the Board urged before the court had not even been before the Board when it ruled. First, the Board presented SEC filings reporting that RSM McGladrey, Inc. performed four services—"test[ing] systems of internal controls," "internal audit," "due diligence audit," and

"collateral field audit"—that the Board suggested had confused RSM McGladrey, Inc. with petitioner. But none of those services involved *financial statement audits* and are thus proper non-attest services for RSM McGladrey, Inc. to perform. Second, the Board noted that an RSM McGladrey, Inc. employee testified as an auditing expert, another permissible non-attest service. In the end, the Board supported its conclusion that petitioner's name change would be deceptive with evidence that amounted to nothing more than that non-attest services are performed by non-attest RSM entities.

Instead of independently reviewing that evidence to determine whether it justified restricting petitioner's First Amendment rights, the court placed the burden on petitioner to show that the Board's decision was not supported by "substantial evidence." App. 13a. Based on the Board's presentation, the court concluded that "[t]he Board considered and found relevant and substantial evidence tending to show petitioner's proposed name could be confusing and deceptive and determined petitioner's proffered firm name is deceptive to the general public."[2] The court of appeals thus affirmed the declaratory ruling. *Id.* at 8a.

Judge Wynn dissented, concluding that because the "Board has failed to show how the name will be misleading or deceiving," he would have reversed the declaratory ruling. App. 14a. He would have ruled that the potential for deception advanced by the Board was "merely conjecture" and could not satisfy this Court's commercial speech precedents. *Id.* at 15a. Because the court of appeals was divided, petitioner was entitled to automatic review in the

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[2] This passage is unclear as to whether the court believed that the Board had determined that the proposed firm name was "actually or inherently misleading" or only "potentially misleading." As explained *infra* at 15-19, however, a court must review the record *de novo* in either event.

Supreme Court of North Carolina, which affirmed the court of appeals in a *per curiam* order without an opinion.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision to apply "substantial evidence" review to a state agency's or board's speech restriction conflicts with the decisions of the New Hampshire, Pennsylvania, Iowa and Alabama supreme courts. All of those courts have recognized that a court presented with a free speech challenge to a state board or agency ruling must conduct *de novo* review of facts and law. This Court should resolve that conflict.

The North Carolina courts' deference to the Board here also cannot be squared with the *de novo* review that this Court has applied in similar circumstances. In *Peel* v. *Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990), a plurality of this Court expressly concluded that a state professional regulatory board's determination that commercial speech falls outside the protection of the First Amendment should be reviewed *de novo*. Even when this Court has not been explicit as to the standard of review it was applying in a particular case, this Court has nevertheless regularly employed the most searching review to determine whether speech restrictions imposed by professional regulatory boards were justified. This approach has been followed both pre- and post-*Peel*. This Court has never sanctioned deference to state professional regulatory boards on vital First Amendment issues, nor should it. State professional regulatory boards for accountants are comprised largely of competitors of those being regulated. Their judgments regarding facts of constitutional significance—such as whether a proposed name is deceptive and hence beyond First Amendment protection—are neither informed by particular expertise nor entirely free from the taint of their competitive interest.

In addition, the impact of the ruling here is not confined to North Carolina, but is in fact of national and even international significance. As noted above, name branding carries powerful speech effects. And a name, by its nature, must be uniform in all jurisdictions in which the firm practices. If a single firm's name varies by jurisdiction, the risk of confusion that supposedly animated the Board's and lower courts' rulings will inevitably arise. Even though every other regulatory board to have been asked would allow petitioner's change, North Carolina's lone refusal effectively prevents the name change everywhere, or creates needless confusion by consumers. This Court is the only body able to provide petitioner relief from North Carolina's nationally restrictive ruling.

1. The North Carolina courts' deference to the Board conflicts with decisions of other state supreme courts. Various state supreme courts have concluded that *de novo* review of a state board or agency decision is required, even as to facts, when the decision is challenged as violating free speech rights. The New Hampshire Supreme Court has held that it must conduct *de novo* review of a state dental board's ruling that advertising is "inherently misleading." *Appeal of Sutfin*, 693 A.2d 73, 75 (N.H. 1997). The dental board in *Sutfin* had parsed the advertisement in question, and made specific findings that certain statements were deceptive to members of the public. *Id.* at 74. Nonetheless, the New Hampshire Supreme Court concluded that it was bound to examine the record for evidence of actual deception, and after finding no such evidence, drew its own conclusions regarding whether the public would be deceived by the advertisement. *Id.* at 75-76.

Other state courts have held *de novo* review is required whenever First Amendment challenges are raised to a state board or agency ruling. *J.S. ex rel. H.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 853 n.7 (Pa. 2002) (treating school district as "local agency for purposes of judicial review" and

stating that "[a]s the issue in this case deals with whether the local agency committed constitutional error, our standard of review is *de novo*"); *Johnson* v. *Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 84 (Iowa 1985) (noting that "administrative agency's factual determinations are less sacrosanct than usual when the judicial review is of a constitutional question" and that the "authorities which in general require courts to yield to non-arbitrary administrative determinations uniformly provide an exception for constitutional questions"); *Lesiak* v. *Ohio Elections Comm'n*, 716 N.E.2d 773, 775 (Ohio Ct. App. 1998) ("Where constitutional issues such as political speech and freedom of association are presented, the standard of review to be utilized by the reviewing court is a *de novo* review, without deference being given to the agency's decision.").

As the Alabama Supreme Court has concluded:

> In reviewing a claim that an employee has been terminated for exercising the right to free speech, an appellate court must make an independent examination of the whole record, in order to ensure that the judgment of an administrative review panel does not constitute a forbidden intrusion on the field of free expression. This is a rule of Federal constitutional law, reflecting the conviction that judges must exercise independent review in order to preserve these liberties, and this rule is binding upon state appellate courts.

Smith v. *Alabama Aviation & Technical Coll. (Ex Parte Smith)*, 683 So. 2d 431, 436 (Ala. 1996) (citation omitted). The Alabama Supreme Court has thus made clear that not only is *de novo* review appropriate when a state board or agency issues a ruling that restricts free speech, but the Constitution requires such review. The North Carolina courts' application of substantial evidence review here conflicts with the decisions of other state supreme courts, thus warranting this Court's review.

2. This Court has regularly conducted an independent review of decisions of professional regulatory boards that infringe upon commercial speech. The state decisions applying *de novo* review are well grounded in this Court's own rulings. The North Carolina courts' decision to review this ruling for substantial evidence is inconsistent with this Court's repeated application of *de novo* review to state professional regulatory board rulings that infringe on speech. In *Peel*, a plurality of this Court declared *de novo* review to be the rule, while in other cases the Court carried out *de novo* review without so stating. This Court should accept review in this case to make clear that its own consistent practice reflects a controlling rule of law.

Peel presented a challenge to a censure imposed by the Supreme Court of Illinois (acting as the ultimate attorney regulatory board in that state) upon an attorney who advertised himself as a "'Certified Civil Trial Specialist.'" 496 U.S. at 96-98 (plurality opinion). The State argued that the advertisement was inherently or potentially misleading. Any commercial speech deemed to be "inherently misleading" receives no First Amendment protection. *In re R.M.J.*, 455 U.S. 191, 203 (1982).[3] The critical question in such cases, then, turns on whether the challenged speech is, in fact, "inherently misleading."

Justice Stevens, writing for a four-member plurality, held that the advertisement was neither inherently misleading nor potentially misleading and therefore could not be prohibited. *Peel*, 496 U.S. at 102, 107-08. While the State argued that the public might not understand what the certification meant—particularly with respect to whether the state had

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[3] If commercial speech is deemed "potentially misleading," the state may not prohibit it "if the information also may be presented in a way that is not deceptive." *R.M.J.*, 455 U.S. at 203. Whether commercial speech is inherently or potentially misleading, or not misleading at all, is a question that this Court's decisions, discussed in the text, indicate should be reviewed *de novo*.

approved the certification—Justice Stevens scrutinized the record and rejected this "concern about the possibility of deception in hypothetical cases." *Id.* at 111.

The dissent concluded that the advertisement was misleading and properly banned. It strongly disagreed with the plurality's willingness to reject the finding that this certification could be deceptive to the public, and argued that the Court "should be more deferential" to the State's experience and judgment. *Id.* at 121 (O'Connor, J., dissenting). The plurality flatly rejected the suggestion that deference was appropriate here: "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review."[4] *Id.* at 108.

The *Peel* plurality's stated standard of review has been this Court's practice. This Court has regularly performed an independent, nondeferential review of state professional regulatory board decisions that infringe on commercial speech rights.

For instance, the Court overturned a Florida rule that prohibited accountants from soliciting clients in *Edenfield* v. *Fane*, 507 U.S. 761 (1993). In so doing, the Court rejected certain evidence the State relied upon to claim that such solicitations are potentially fraudulent (including the self-serving statement of the board's former chairman). *Id.* at 771-72. Instead, this Court emphasized portions of the record that led it to the contrary conclusion (such as various articles appearing in the professional literature). *Id.* at 772-73.

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[4] Concurring in the judgment, Justices Marshall and Brennan held that the certification was not inherently misleading but was potentially misleading. Because these Justices held that the Illinois regulation at issue was unconstitutional as applied to the petitioner, however, they voted to reverse the censure. *Peel*, 496 U.S. at 111 (Marshall, J., concurring in the judgment). While the concurrence did not expressly address the standard of review it applied, nothing in their disposition of the case indicates that they deferred to the Illinois Supreme Court's findings.

Rather than deferring to the evidence cited by the State, this Court independently reweighed the evidence in the record and concluded that the Board had failed to demonstrate that banning the solicitation of clients was a permissible restriction on commercial speech. *Id.* at 771.

Similarly, a state rule setting various restrictions on an attorney's right to advertise his services was partially rejected in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985). The Court first carefully reviewed the record to determine whether the petitioner's advertised willingness to handle Dalkon Shield litigation was the type of inherently misleading speech that could be prohibited *per se*. It held that "we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary." *Id.* at 644. Then on the question of whether an illustration in the advertisement was potentially misleading, the Court held that "none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements." *Id.* at 648-49. But after closely reviewing the advertisement—not just deferring to the state's reading of it—the Court held that the advertisement's claim that a losing client would owe "'no legal fees'" was misleading because it failed to inform potential clients that they would nevertheless be liable for the costs of the litigation. *Id.* at 652.

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court reversed disciplinary sanctions imposed against two young attorneys who advertised the price of their services in violation of state rules. *Id.* at 354-55. While the State put forth no fewer than six justifications to support its rules against price advertising, including that such advertising is either inherently or potentially misleading, the Court carefully reviewed the evidence and assumptions put forth by the State, as well as relevant independent studies. *Id.* at 368-82. After this detailed review of the record, the Court held that "it has

not been demonstrated that the advertisement at issue could be suppressed." *Id.* at 382.

This Court has also prevented a state from relying on rote invocation of a professional regulatory rule to justify a particular speech restriction. In *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136, 142 (1994), this Court accepted review of a state intermediate appellate court decision and overturned its ruling to restrict the commercial speech of a practicing attorney who wished to advertise that she was a Certified Public Accountant and a Certified Financial Planner. *Id.* at 138. While the state, pointing to its professional regulatory rule, contended that such designations were inherently misleading, the Court held that "[t]o survive *constitutional review*, the Board must build its case on specific evidence." *Id.* at 144 (emphasis added). After closely reviewing the evidence marshaled by the state, the Court found the state's evidence insufficient, and it reversed the ban on the advertisement. *Id.* at 148.[5]

Even when this Court *has upheld* a commercial speech restriction imposed by a state professional regulatory board, it has done so only after first satisfying itself that the record justified the restriction. See, *e.g.*, *Zauderer*, 471 U.S. at 652. For example, in *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld a Florida rule prohibiting lawyers from mailing solicitations to accident victims until 30 days following the accident. "After scouring the record,"

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[5] On other occasions, this Court has not hesitated to reject commercial speech regulations in similar circumstances that, after its own independent review, were determined to be unsupported by the record. *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 477-78 (1988) (rejecting restriction on attorney's right to mail letters offering his services to individuals facing foreclosure, noting that the record "furnish[ed] no evidence" that the mailing was misleading because it would convey a false impression of the attorney's familiarity with the individuals' cases); *R.M.J.*, 455 U.S. at 205-07 (rejecting restriction on attorney's advertising because nothing in the record indicated that the speech was misleading).

which included the results of a two-year study by the Florida Bar into the effects of lawyer advertising, *id.* at 626, 628, and even going so far as to independently look for contrary evidence, *id.* at 634, the Court held that such solicitations created "demonstrable detrimental effects" and could therefore be regulated. *Id.* at 631.[6]

3. The role of de novo *review in the protection of free speech rights.* This Court's practice of vigorously reviewing the record to ensure that speech rights have been respected has not been limited to cases arising out of state professional regulatory boards. *De novo* review has been the norm in the full range of free speech cases, reflecting this Court's acknowledgment of the special role courts play in securing First Amendment rights.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court independently reviewed the evidence of "actual malice" presented to a jury in a libel trial "to determine whether it could constitutionally support a judgment for respondent." *Id.* at 284-85. Because speech rights were involved, the Court explained that

> [t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we '*examine for ourselves* the statements in issue and the

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[6] In *Friedman* v. *Rogers*, 440 U.S. 1 (1979), this Court upheld a Texas statute prohibiting the practice of optometry under trade names, but only after concluding that the opportunity for deception presented by the practice was "substantial and well demonstrated," including evidence of actual deceptive practices that had occurred. *Id.* at 15.

> circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.' *Pennekamp* v. *Florida*, 328 U.S. 331, 335. *We must 'make an independent examination of the whole record,' Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. at 285 (first omission in original) (emphases added) (citations omitted); *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 688-89 (1989); *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-88 (1964). Indeed, "[t]he simple fact is that First Amendment questions of 'constitutional fact' *compel this Court's de novo review.*" *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 509 n.27 (1984) (emphasis added). In the context of reviewing factual findings by a district court judge, this Court in *Bose* emphasized that *de novo* review was required "particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Id.* at 503. In such cases, "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 511.[7]

As *Bose* detailed, this Court has applied its independent judgment to review the record to resolve many free speech questions, including whether statements were "'fighting words,'" *Street* v. *New York*, 394 U.S. 576, 592 (1969); whether advocacy was directed to inciting lawless action, *Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); what appeals to the "'prurient interest'" or is "'patently offensive'" under the standard obscenity test, *Miller* v. *California*, 413 U.S. 15, 30 (1973), and *Jenkins* v. *Georgia*,

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[7] *Bose* thus stands for giving "quite little deference to the initial factfinder" in First Amendment cases. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 920 n.40 (1995) (Thomas, J., dissenting).

418 U.S. 153, 159-61 (1974); and whether particular expression constituted child pornography or protected speech, *New York* v. *Ferber*, 458 U.S. 747, 774 (1982). See *Bose*, 466 U.S. at 505-08. In all these circumstances, this Court has independently reviewed the record to define the line between protected and unprotected speech.

Bose recognized that the same kind of judicial line-drawing involved in obscenity and libel cases is also required in commercial speech cases. *Id.* at 504 n.22. As with obscene speech and libelous statements, any commercial speech deemed to be "inherently misleading" receives no First Amendment protection. *R.M.J.*, 455 U.S. at 203. The critical question in such cases, then, turns on a "constitutional fact:" whether the challenged speech is, in fact, "inherently misleading," or is, in fact, obscene, or is, in fact, uttered with reckless disregard for the truth.

Review of determinations of such "constitutional facts" in the commercial speech context ought to be, and, as discussed above, has been, as vigorous as it is in other categories of protected speech. As this Court has emphasized, because in a "free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.... the free flow of commercial information is indispensable." *Virginia State Bd. of Pharmacy* v. *Virginia State Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). As such, "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980).[8]

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[8] As noted above, *supra* at 6-8, consumers of petitioner's services have a keen interest in petitioner's right to brand itself in a way that enhances its reputation. For many companies, the choice of an auditor is often critical to validating their financial condition to the public. Under these circumstances, when the need for a service is critical, this Court has noted

The application of *de novo* review in the commercial speech context is well grounded in sound policy. Because the conclusion that speech is "misleading" is actually a declaration that certain speech is unprotected by the First Amendment, the determination of what counts as "misleading" takes on the character of declaring what the law is, rather than what the facts are. *Bose*, 466 U.S. at 501 n.17 ("At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."). The declaration of "what the law is" has always been understood as a matter for appellate courts to determine without deference to factfinders.

Relatedly, *de novo* appellate review promotes uniformity in the development and application of free speech law. The plurality in *Peel* noted that the "abdication of review would create radical disparities in First Amendment protections from State to State." 496 U.S. at 108 n.16. As this case readily demonstrates, there is little reason to believe that state professional regulatory boards view the judgments of their out-of-state peers with the same kind of respect that courts give to judicial decisions from other jurisdictions. Despite the fact that no other state board has rejected the name change, the Board in North Carolina refused to allow it. *De novo* court review would better ensure that such anomalous regulatory action would not, as here, distort the free flow of important commercial speech nationwide.

Further, deference to professional regulatory boards is unfounded because the professionals who staff such boards

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that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates*, 433 U.S. at 364. The would-be regulators of that flow thus bear the burden of justifying the need to regulate commercial speech. *See Zauderer*, 471 U.S. at 646; *Edenfield*, 507 U.S. at 770.

are unfamiliar with free speech principles and their proper application. In addition, their professional interest may cloud their judgment. Here, for example, only one of the Board's members had practiced with a national firm, and he was retired. The trend to nationalize and even internationalize accounting practices that petitioner seeks to follow here is in tension with the financial interests of many of the Board's members. Similarly, in *Bates* and *R.M.J.*, state bar committees (composed of established attorneys) took action against young lawyers who sought to break into the legal market by advertising their services—a potential risk to established practices. See *Bates*, 433 U.S. at 378 (holding that ban on advertising "serves to perpetuate the market position of established attorneys"). In *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973), this Court recognized that such pecuniary incentives were sufficiently powerful to prohibit members of the Alabama Board of Optometry from participating in license revocation proceedings of optometrists practicing in a competing branch of the profession. Similar concerns support the application of *de novo* review here.

State professional regulatory boards stand in sharp contrast with the regulators at the Federal Trade Commission, who are not competitors of those being regulated, who "deal[] continually with cases" of alleged deceptive advertising, and whose determinations in those cases this Court has indicated warrant some deference. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385-86 & n.14 (1965). There is no reason to believe that the North Carolina courts believed that this Court's deference to the FTC supported deference to the Board in this case. And any such reliance on *Colgate-Palmolive* would have been erroneous. In any event, this Court should accept review in this case to clarify that deference to the FTC in deceptive advertising cases is based on its unique degree of experience and expertise in the field, which helps promote uniformity in application of First

Amendment principles, and that those principles do not extend to state professional regulatory boards.

The potential to undermine what should be the uniform protections of the First Amendment is particularly acute in this case because of the unduly deferential standard of review the North Carolina courts employed. The North Carolina Court of Appeals defined the "substantial evidence" that was necessary to support the Board's ruling as follows:

> "Substantial evidence is "'relevant evidence a reasonable mind *might accept as adequate* to support a conclusion.'" A reviewing court "'may not substitute its judgment for the agency's,'" even if a different conclusion may result under a whole record review."

App. 5a (emphasis added) (quoting *Vanderburg* v. *North Carolina Dep't of Revenue*, 608 S.E.2d 831, 839 (N.C. Ct. App. 2005)). Moreover, the court held that "[t]he burden of proof is not on the administrative agency or the Board to justify its decision, but rather it rests upon the petitioner" to show that the decision was not supported by "'substantial evidence.'" *Id.* at 13a (quoting *In re Appeal of Maharishi Spiritual Ctr. of Am.*, 569 S.E.2d 3, 12 (N.C. Ct. App. 2002)). For petitioner to vindicate its rights before the North Carolina courts, therefore, it needed to prove that no reasonable mind could agree with the Board's decision. This standard has built into it room for disagreement—the Board's decision should stand even if the court would not have reached the same conclusion on its own. In short, the Board's standard builds into court review the very disparity in protection for First Amendment rights that *Peel* proclaims is inappropriate.

When a state professional regulatory board is called upon to make findings of constitutional significance, deference to its judgment amounts to a near complete abdication of judicial review. There is nothing to determine in this case except whether petitioner's name change is misleading. Under the highly deferential standard of review adopted by the court of

appeals here, a restriction that a court recognizes is inconsistent with the First Amendment could nonetheless be upheld, thus damming the free flow of commercial information necessary to our economy. Both speakers and listeners are injured by the rule applied by the courts below.

4. Deferential review is unworkable here. For all the doctrinal reasons stated above, deferential review of the Board's ruling is misplaced. It is also inappropriate in this case because it cannot be sensibly applied given the way the Board procedurally disposes of cases before it that involve constitutional questions.

The Board itself does not decide constitutional questions. To the contrary, the decision here was simply a rote application of the Board's own regulations governing CPA firm names.[9] See App. 21a (citing 22 N.C. Admin. Code 8N .0307). Indeed, as one Board member conceded during the hearing, petitioner's proposed name is not deceptive, but "it's just that it gets caught up in the language of our rules." The Board cited *Friedman* for the proposition that trade

[9] Notably, many other states, including several of those that approved petitioner's proposed name change, have similar rules. *See, e.g.*, Ala. Admin. Code r. 30-X-6-.05; Ariz. Admin. Code § 4-1-455.03; Ark. Code R. 019 00 001; Cal. Bus. & Prof. Code § 5060; 3 Colo. Code Regs. 705-1; Conn. Agencies Regs. § 20-280-15c; Del. Code Regs. § 24 100; D.C. Mun. Regs. tit. 17, § 2513; Fla. Stat. § 473.321; Ga. Comp. R. & Regs. 20-12-.17; Idaho Admin. Code r. 01.01.01.406; Ind. Code § 25-2.1-12-5; Iowa Code § 2.13; Kan. Stat. Ann. § 1-316; Ky. Rev. Stat. Ann. § 325.380; Md. Code Regs. 09.24.01.06; 252 Mass. Code Regs. 3.05(5); Minn. Stat. Ann. § 326A.10; 50-022-001 Miss. Code R. § 3.1; Mo. Code Regs. Ann. tit. 4, § 10-3.060; 288 Neb. Admin. Code § 11-002; Nev. Admin. Code § 628.140; N.H. Rev. Stat. § 309-B:14; N.J. Stat. Ann. § 45:2B-62; N.M. Code R. § 16.60.4.9; N.Y. Educ. Law § 7408; Ohio Admin. Code 4701-11-05; Okla. Admin. Code § 10:15-39-8; Or. Rev. Stat. § 673.320; R.I. Code R. § 02-020-004; S.C. Code Ann. Regs. 1-21; S.D. Admin. R. 20:75:05:15; Tenn. Comp. R. & Regs. 0020-3-.15; 22 Tex. Admin. Code § 501.83; Vt. Code R. 04-030-010 § 10.12; Va. Code Ann. § 54.1-4414; Wash. Admin. Code 4-25-661; W. Va. Code, § 30-9-26; Wis. Admin. Code Accy § 1.405; Wyo. Code R. ch. 6, § 5(c).

names may be prohibited, *id.* at 24a, and viewed that as sufficient authority to reject the proposed name change in this case without identifying anything in the record that supported the restriction. This approach, of course, is flatly at odds with the analysis of the Court in *Friedman*. *Friedman* v. *Rogers*, 440 U.S. 1, 15 (1979). Because the Board itself admittedly never considered the constitutional question in light of any evidence that could illuminate whether petitioner's name change would be misleading, there was no judgment to which a court could defer.

The supposedly "substantial evidence" in the record in this case was actually placed in the record by the Board *during the litigation in court* when the issue was whether the Board's ruling should be upheld. The Board did not consider the evidence to which the court deferred when it rejected petitioner's name change. App. 7a (discussing evidence supposedly supporting Board's conclusion that name change would be misleading). To allow the Board to demonstrate that "substantial evidence" supports its decision by creating evidence *after* the decision has been made and thereby restrict petitioner's commercial speech makes a mockery of judicial review, and completely de-fangs the protections of the First Amendment.

5. The Board's decision in this case could not survive de novo *review.* This case thus turns on whether petitioner's name change was properly characterized as "inherently misleading."[10] The Board determined that petitioner's name change violated the rules governing appropriate names for North Carolina CPA firms. *Supra* at 8-10. When forced in court to explain *why* the violation of that rule warranted restricting petitioner's commercial speech rights, the Board

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[10] The North Carolina Court of Appeals did not specify whether it believed there was substantial evidence to support a finding that petitioner's name change was "inherently" or only "potentially" misleading. App. 8a. As noted above, either way, it was error to review the question only for substantial evidence. *Supra* at 11 n.2.

argued that petitioner's name change was misleading. The Board made no effort to defend the restriction on petitioner's speech as "in furtherance of a substantial state interest," *Central Hudson*, 447 U.S. at 563-64, beyond the interest in preventing consumers from being misled. Unless petitioner's name change is deemed misleading, there is, therefore, no basis for rejecting it.

Petitioner's proposed name, RSM McGladrey & Pullen, LLP, Certified Public Accountants, would convey two pieces of accurate commercial information: petitioner is affiliated with RSMI and petitioner is a firm of Certified Public Accountants. Notably, the Board has never disputed and could not seriously contest the truth of these two points. Instead, the Board rejected the name change based upon its assertion that the public might draw inaccurate conclusions about petitioner or other RSM entities.

First, the Board believes that the public may inaccurately conclude that "RSM" is the name of a practicing accountant who is a partner in petitioner. App. 21a-22a. The only support for this assumption is the Board's own rule prohibiting "[t]he name of a non-CPA owner in a CPA firm name."[11] *Id.* at 21a. But the Board cannot rely upon the circular argument that because petitioner's proposed name allegedly violates the Board's rules it can *constitutionally* be prohibited. *Ibanez*, 512 U.S. at 144. And the Board cites no studies, such as those presented in *Went For It*, to indicate what North Carolina residents in fact believe or understand about the names in a CPA firm title.

More importantly, the Board's legitimate interest in protecting against deception plainly *does not* require that all names in a CPA firm title be practicing accountants. To the contrary, many firms in North Carolina utilize the names of

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[11] Because "RSM" is not a "non-CPA owner" of petitioner (which is wholly-owned by its partners), however, it is far from clear that this rule is even applicable.

long dead partners, retired partners, or even foreign firm names[12] as brands. The record does not contain even one example of a person who was surprised to learn, for example, that Mr. Deloitte retired from the practice of accounting in 1897 (or, for that matter, that Messrs. McGladrey and Pullen are deceased), much less that such person actually suffered any *harm* from such "mistakes." The Board's concerns are even more specious in light of the fact that petitioner does not market its services to the public at large, but specializes in servicing sophisticated business clients. Because petitioner's "prospective clients are sophisticated and experienced business executives," the State's interest in policing that relationship is diminished. *Edenfield*, 507 U.S. at 775. And, if one of those business clients was unsure of the status of "RSM," a simple call to the Board or to petitioner would clear up that issue in short order. See *Ibanez*, 512 U.S. at 145 n.9 (holding that public's ability to clear up potential misunderstanding by a phone call reduces state's interest in regulating speech). The record simply does not indicate that this supposedly inaccurate conclusion is likely, much less that it would be harmful.

Second, the Board believes that petitioner's name change would create "the impression that any firm using a name that begins with 'RSM,' regardless of the nature of that firm, is a lawful CPA firm." App. 22a. Once again, there is simply no evidence to support this assertion.[13] Indeed, petitioner seeks

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[12] "KPMG," for example, is a series of initials representing four accounting firms, both domestic and foreign. Grant Thornton, another accounting firm licensed to practice in North Carolina, is a combination of the former names of an American and a British accounting firm.

[13] The Board apparently includes RSM McGladrey, Inc. as an entity that could be confused with petitioner. App. 22a. As noted above, however, the *only* evidence in the Board's declaratory ruling to support this claim of confusion is a company directory that clearly and correctly explains their relationship. *Id.* at 22a-23a. The additional evidence later

to go even further than North Carolina law requires to prevent this confusion by identifying itself *in its name* as a Certified Public Accounting firm, something its competitors have not done. Despite the fact that the brands utilized by petitioner's competitors, such as Ernst & Young, KPMG, BDO Seidman, Deloitte, and Dixon Odom, are shared by attest and non-attest firms, the Board has not identified even one instance in which someone was harmed by mistakenly identifying a non-attest firm as a firm licensed to audit financial statements. Nor has the Board presented any evidence that any other RSM entity performed a service that only petitioner was licensed to do.

The dissent by Judge Wynn in the court of appeals underscores the fact that the Board's rejection of petitioner's name change could not survive *de novo* review. Judge Wynn scrutinized the record and concluded that it presented "mere[] conjecture" and no "concrete reason" for the Board's decision. App. 15a.

The Board's inability to put forth any evidence in its favor is not surprising, for petitioner and its competitors have a strong interest in ensuring that *all* of the entities affiliated with their respective brands act within their proper limits. If, as concerns the Board, an RSM entity other than petitioner were approached to perform auditing services within North Carolina, that entity would simply refer the business to petitioner; to do otherwise would undermine the purpose of the RSM brand. The Board thus failed to demonstrate that any real harm would result even if some hypothetical member of the public might incorrectly approach another RSM entity to perform services that only petitioner is authorized to perform. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to redress ... anticipated harms, ... [i]t must demonstrate that the recited harms are real, not merely conjectural ....") (Kennedy, J.).

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put forth by the Board before the courts similarly fails to show that this supposed risk of confusion constitutes a real harm. *See supra* at 10-11.

Once again, it is the Board's burden to "demonstrate[] with sufficient specificity that any member of the public could have been misled by [petitioner's] constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." *Ibanez*, 512 U.S. at 139. Under *de novo* review of the record, it is apparent that the Board is hopelessly short of meeting this burden. This Court should grant a writ of certiorari to clarify that such decisions are entitled to no deference and are instead subject to meaningful, *de novo*, judicial review.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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August 4, 2006

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 469A05

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

April 7, 2006

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C.App. ___, 615 S.E.2d 339 (2005), affirming an order entered on 18 March 2004 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Supreme Court 14 March 2006.

Parker Poe Adams & Bernstein, LLP, by William L. Rikard, Jr., Jack L. Cozort, and Kristin R. Poolos, Charlotte, for petitioner-appellant.

Allen and Pinnix, P.A., by Noel L. Allen and M. Jackson Nichols, Raleigh, for respondent-appellee.

PER CURIAM.

AFFIRMED.

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

No. COA04-911

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

July 19, 2005.

TYSON, *Judge.*

McGladrey & Pullen, LLP ("petitioner") appeals from order adopting and affirming the declaratory ruling issued by The North Carolina State Board of Certified Public Accountant Examiners (the "Board"). We affirm.

I. Background

Petitioner is a North Carolina limited liability partnership and licensed by the Board to practice in North Carolina as a certified public accounting ("CPA") firm. Petitioner specializes in providing audit and attest services for mid-sized businesses. Petitioner is affiliated with RSM McGladrey, Inc., a national consulting, wealth management, and corporate finance firm, through an "Alternative Business Structure."

RSM McGladrey, Inc. is a member of RSM International, Inc., a subsidiary of H & R Block. "RSM" is an acronym for Robson Rhodes, a United Kingdom firm, Salustro Reydel, a firm in France, and petitioner.

In Fall 2002, petitioner sought to change its name from "McGladrey & Pullen, LLP" to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Petitioner gave notice of intent to change its name to each jurisdiction in which it was registered.

On 1 October 2002, Robert N. Brooks, the Board's executive director, recommended petitioner's name change request be rejected on the grounds the initials "RSM" could deceive the public by conveying the impression that any firm using a name that begins with "RSM" is a lawful CPA firm.

On 11 March 2003, petitioner submitted its request to the full Board for a declaratory ruling. By letter dated 2 May 2003, the Board informed petitioner that the Board adopted the declaratory ruling on 28 April 2003 denying petitioner's request and ruling petitioner's proposed name change to "RSM McGladrey & Pullen, LLP, Certified Public Accountants" violated N.C. Admin. Code. Tit. 21, 8N.0307.

On 30 May 2003, petitioner filed a petition in the Wake County Superior Court for judicial review. The petition was heard on 26 February 2004 and on 18 March 2004, the trial court entered an order affirming the Board's declaratory ruling. Petitioner appeals.

II. Issues

Petitioner contends the trial court erred by: (1) violating petitioner's right to free speech and equal protection under the North Carolina and United States Constitutions; (2) affirming the declaratory ruling of the Board after it acted outside of its statutory authority and jurisdiction in violation of N.C. Gen.Stat. § 150B-51(b)(2); and (3) being arbitrary and capricious in affirming the Board's ruling.

III. Standard of Review

Upon our "judicial review of an administrative agency's final decision, the substantive nature of each assignment of

error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). N.C. Gen.Stat. § 150B-51(b) (2003) states:

> in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

"This standard of review applies to judicial review of an agency's decision, whether at the superior or the appellate court level." *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C.App. 598, __, 608 S.E.2d 831, 839 (2005) (citing *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C.App. 527, 532, 406 S.E.2d 613, 616-17 (1991) (superior court review)); *see also Crist v. City of Jacksonville*, 131 N.C.App. 404, 405, 507 S.E.2d 899, 900 (1998) (appellate court review) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C.App. 420, 421, 458 S.E.2d 510, 511 (1995)).

This Court has held that fact-intensive issues

> "'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.'" This standard of review requires the reviewing court to analyze all the evidence provided in the record "to determine whether there is substantial evidence to justify the agency's decision." Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." A reviewing court "may not substitute its judgment for the agency's," even if a different conclusion may result under a whole record review.

Vanderburg, 168 N.C.App. at ___, 608 S.E.2d at 839 (internal quotations and citations omitted).

In *In re Appeal of the Maharishi Spiritual Ctr. of Am.*, our Supreme Court revered [sic] the Court of Appeals for reasons stated in the dissenting opinion and explained the Court's proper role under the whole record test when reviewing an administrative agency's ruling or judgment.

> The whole record test is not "a tool of judicial intrusion." This test does not allow a reviewing court to substitute its own judgment in place of the Commission's judgment even when there are two reasonably conflicting views. The whole record test merely allows a reviewing court to determine whether the decision of the Commission is supported by substantial evidence.
>
> "'Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" "The credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine." This Court cannot

> overturn the Commission's decision if supported by substantial evidence.

152 N.C.App. 269, 284, 569 S.E.2d 3, 12 (2002) (J. Tyson dissenting) (internal quotations and citations omitted), *per curiam rev'd*, 357 N.C. 152, 579 S.E.2d 249 (2003).

IV. Free Speech

Petitioner argues the trial court erred in affirming the Board's declaratory ruling because it violated petitioner's constitutional freedom of speech.

"'Untruthful speech, commercial or otherwise, has never been protected for its own sake.'" *Friedman v. Rogers*, 440 U.S. 1, 9, 99 S.Ct. 887, 59 L.Ed.2d 100, 110 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961)). In *Central Hudson Gas v. Public Service Comm'n*, the United States Supreme Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341, 348 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979)).

The United States Supreme Court also held "the First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas*, 447 U.S. at 561, 100 S.Ct. at 2349, 65 L.Ed.2d at 348 (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761-63, 96 S.Ct. at 1825-26, 48 L.Ed.2d at 346). The Supreme Court explained:

> The First Amendment's concern for commercial speech is based on the informational function of advertising.

> Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. *The government may ban forms of communication more likely to deceive the public than to inform it,* or commercial speech related to illegal activity. If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.

Id. at 564, 100 S.Ct. at 2350, 65 L.Ed.2d at 348-49 (internal citations omitted) (emphasis supplied).

The respondent Board is a State agency created by N.C. Gen.Stat. § 93-12 to regulate CPA firms. One of the Board's duties is to regulate the manner in which CPA firms hold themselves out to the public. N.C. Admin. Code tit. 21, 8N.0307(a) (2004) entitled, "Deceptive Names Prohibited," allows the Board to prohibit a CPA firm from using any name that would have "the capacity or tendency to deceive."

The parties agree the regulation at issue restricts petitioner's commercial speech. The parties disagree on whether adding "RSM" and "Certified Public Accountants" to petitioner's trade name is misleading, tends to be deceptive, and whether the regulation as applied, violates petitioner's First Amendment rights.

Evidence before the Board included: (1) a U.S. federal claims court case wherein a managing director of RSM McGladrey, Inc. testified and was referred to as an expert in auditing; and (2) several filings with the Securities and Exchange Commission showing the public misperception and referring to "RSM McGladrey" as a public accounting firm and confusing ownership and services rendered by the firm.

The Board may "ban forms of communication more likely to deceive the public than to inform it." *Central Hudson Gas,*

447 U.S. at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 349 (citing *Friedman*, 440 U.S. at 13, 99 S.Ct. at 896, 59 L.Ed.2d at 113; *Ohralik v. Ohio State, Bar Assn.*, 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1923-24, 56 L.Ed.2d 444, 461 (1978)). The Board exercised its discretion under its statutory authority to determine what firm names are acceptable. N.C. Admin. Code. tit. 21, 8N.0307(a). We may not substitute our judgment for the agency's and must only look to see if there is substantial evidence to support their conclusion. *Watkins v. N.C. State Bd. Of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). The Board considered and found relevant and substantial evidence tending to show petitioner's proposed name could be confusing and deceptive and determined petitioner's proffered firm name is deceptive to the general public. *Central Hudson Gas*, 100 S.Ct. at 2350-51, 447 U.S. at 563-64, 65 L.Ed.2d at 349.

Petitioner fails to show the Board's findings of fact are not supported by substantial evidence and those findings do not support the court's conclusions of law. The trial court's holding that the Board did not violate petitioner's freedom of speech under the United States or North Carolina Constitutions is affirmed.

V. Equal Protection

Petitioner alleges the names "RSM McGladrey Inc." and "RSM McGladrey & Pullen L.L.P. Certified Public Accountants" are not deceptive or misleading. Petitioner asserts the Board failed to apply its standard of review equally.

"Inequalities and classifications, however, do not, *per se*, render a legislative enactment unconstitutional." *Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968) (citing *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659; *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949); 2 Strong, N.C. Index 2d, *Constitutional Law* § 20 (1967)). Our Supreme Court has held "[c]lassi-

fications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.'" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 67, 366 S.E.2d 697, 700-01 (1988) (quoting *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968)). The Court also held "[c]lassification[s][are] permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Id.* at 67, 366 S.E.2d at 701 (citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)).

Petitioner argues it received unequal review and treatment from the Board and cites the Board's approval of Grant Thornton as a trade name in 2002. The Board's rulings in Grant Thornton's case and petitioner's case are easily distinguishable.

Grant Thornton is a long established CPA firm in North Carolina and was using its approved trade name prior to 1999. Grant Thornton continued its operation as a CPA firm with the "Grant Thornton" name. "RSM McGladrey & Pullen, LLP Certified Public Accountants" is not a long established CPA firm in North Carolina. RSM is not an individual CPA nor is it a licensed CPA firm in any state or United States territory. Petitioner's proposed name change occurred after the grand-fathering provision established in 1999 to allow continued use of existing trade names expired.

The Board's regulation allowing grand-fathering of trade names is based on criteria that petitioner does not meet. N.C. Admin. Code tit. 21, 8N.0307(c) (2004) states any CPA firm that has continuously used an assumed name approved by the Board prior to 1 April 1999 may continue to use the assumed name subject to certain restrictions. Furthermore, petitioner concedes that RSM International, Inc.'s status is different from the "Big Four" accounting firms. RSM International,

Inc. is a non-CPA association and not a national or international CPA firm.

Petitioner fails to show the evidence before the Board and the record before the trial court lacked substantial evidence to support the Board's findings of fact, or that those findings support the Board's conclusions of law. *Vanderburg*, ___ N.C.App. at ___, 608 S.E.2d at 839. Petitioner fails to proffer evidence of a similarly situated firm that received unlawful preferential treatment or treatment inconsistent with the Board's decision in petitioner's case. *Poor Richard's, Inc.*, 322 N.C. at 67, 366 S.E.2d at 700-01. We affirm the trial court's holding that the Board did not violate petitioner's constitutional right of equal protection.

VI. Statutory Authority of the Board

Petitioner alleges the trial court erred by finding the Board acted within its statutory authority. The Board is established and promulgated by N.C. Gen.Stat. § 93-12. This State agency is charged, in part, with certifying and licensing CPAs and adopting or issuing guidelines for their conduct. The Board adopted guidelines for the names CPA firms could use in holding themselves out to the public:

> (a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive. . . .
>
> (b) Style of Practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or a professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA

owner may have as a part of its name the words "associates" or "company" or their abbreviations. It is also considered misleading if a CPA renders non-attest professional services through a non-CPA firm using a name that implies any non-licensees are CPAs.

(c) Any CPA firm that has continuously used an assumed name approved by the Board prior to April 1, 1999, may continue to use the assumed name, so long as the CPA firm is only owned by the individual practitioner, partners, or shareholders who obtained Board approval for the assumed name. A CPA firm (or a successor firm by sale, merger, or operation of law) may continue to use the surname of a retired or deceased partner or shareholder in the CPA firm's name so long as that use is not deceptive.

N.C. Admin. Code tit. 21, 8N.0307(a)-(c) (2004).

Petitioner appeals the trial court's decision affirming the Board's finding the proposed firm name "RSM" was misleading to the public. The Board possesses the authority to regulate CPA firms and CPA firm names. N.C. Gen.Stat. § 93-12 (2003); N.C. Admin. Code tit. 21, 8N.0307. The Board promulgates rules and guidelines to regulate whether an offered firm name is deceptive to the general public. *Id.; see also* N.C. Admin. Code tit. 21, 8N.0307. The Board determines if firm names are acceptable or deceptive. *Id.;* N.C. Admin. Code tit. 21, 8N.0307. Substantial evidence in the record supports the Board's findings that petitioner's proposed name could be deceptive to the public. *Vanderburg,* ___ N.C.App. at ___, 608 S.E.2d at 839; *see also Central Hudson Gas.*, 447 U.S. at 563-64, 100 S.Ct. at 2350-51, 65 L.Ed.2d at 349 (The government may ban commercial speech that is "likely to deceive.").

Petitioner fails to show the trial court's conclusion that its proposed trade name could be deceptive is not supported

by substantial evidence. The trial court's holding that the Board acted within its statutory jurisdiction and authority is affirmed.

VII. Arbitrary and Capricious

Defendant asserts the trial court acted in an arbitrary and capricious manner in affirming the Board's ruling.

> Where an allegation is made that a final agency decision is not supported by competent evidence or is arbitrary and capricious, the trial court must review the decision under the whole record test. The whole record test requires the trial court to examine all of the evidence before the agency in order to determine whether the decision has a rational basis in the evidence. If the trial court concludes there is substantial competent evidence in the record to support the findings, the agency decision must stand. The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.

Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C.App. 24, 31-32, 594 S.E.2d 832, 837 (2004) (internal citations omitted).

We previously held substantial evidence supports the findings of fact and conclusions of law of the Board's ruling and the trial court's order. After reviewing the whole record and finding substantial evidence, we hold the trial court did not act in an arbitrary and capricious manner in affirming the Board's ruling. This assignment of error is overruled.

VIII. Conclusion

Petitioner fails to show the findings of fact and conclusions of law of the trial court are not supported by substantial evidence. Neither this Court nor the trial court may substitute our own judgment for that of the Board where the record shows substantial evidence supports their decision.

The State, through the Board, may regulate deceptive commercial speech. Regulation of deceptive commercial speech does not violate petitioner's freedom of speech. *Central Hudson Gas*, 447 U.S. at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 349. Substantial evidence in the whole record supports the Board's unchallenged findings of fact, which in turn supports the Board's conclusions of law that petitioner's proposed name had "the capacity or tendency to deceive." N.C. Admin. Code tit. 21, 8N.0307.

Petitioner fails to present any evidence that the Board treated another company similarly situated to petitioner differently or provided preferential treatment in violation of its equal protection rights.

The burden of proof is not on the administrative agency or the Board to justify its decision, but rather it rests upon the petitioner to show the Boards's "findings and conclusions are unsupported by competent, material, and substantial evidence." *In re Appeal of Maharishi Spiritual Ctr. of Am.*, 152 N.C.App. at 284, 569 S.E.2d at 12. Petitioner cannot shift its burden on appeal to the Board utilizing extraneous comments made during the hearing by a Board member as a basis to reverse the Board's unchallenged findings of fact under our standard of review.

The trial court's findings of fact and conclusions of law are supported by substantial evidence in the whole record and are not arbitrary or capricious. Petitioner failed to show any abuse of discretion. The trial court's order is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

In this case, the North Carolina State Board of Certified Public Accountant Examiners ("CPA Board") prohibits McGladrey & Pullen, LLP ("McGladrey & Pullen") from changing its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." In denying this name change, the CPA Board cited N.C. Admin. Code tit. 21, r. 8N.0307(a) (Mar.2003) which provides,

> A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive.

McGladrey & Pullen argues that the CPA Board has failed to meet its burden to show that the proposed name will mislead or deceive the public and, therefore, violates its right to free speech. I agree that the CPA Board has failed to show how the name will be misleading or deceiving. Accordingly, I respectfully dissent.

The United States Supreme Court has long held that "commercial speech" is protected by the First Amendment of the United States Constitution. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770, 96 S.Ct. 1817, 48 L.Ed.2d 346, 363 (1976). The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349 (1980) (internal citations omitted).

In *Cent. Hudson Gas & Elec. Corp.*, the United States Supreme Court set out three prongs the State must meet to validly restrict commercial speech: (1) "The State must assert a substantial interest to be achieved by restrictions on commercial speech[;]" (2) "the restriction must directly advance the state interest involved[;]" and (3) "if the governmental interest could be served as well by a more limited

restriction on commercial speech, the excessive restrictions cannot survive." *Id.*, at 560, 100 S.Ct. at 2350, 65 L.Ed.2d at 350.

McGladrey & Pullen acknowledges that the CPA Board has a "substantial interest in protecting the public from misleading and deceptive names and advertising by CPAs[,]" meeting the first prong of the *Cent. Hudson Gas & Elec. Corp.* test. But McGladrey & Pullen argues that the CPA Board failed to meet the second prong, because the proposed name is not deceptive or misleading and the CPA Board's asserted harms are merely speculative. I agree.

The second prong of the *Cent. Hudson Gas & Elec. Corp.* test "is not satisfied by mere speculation or conjecture[.]" *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543, 555 (1993). In the CPA Board's declaratory ruling denying the name change, it stated "the use of 'RSM' in the name of the firm would have the capacity or tendency to deceive the public by giving the impression that any firm using a name that begins with 'RSM,' regardless of the nature of the firm, is a lawful CPA firm." But this is not a concrete reason for the restriction; instead, it is merely conjecture. Indeed, the record shows that a CPA board member stated, "I think it's important to note that whether it's deceitful or not, we didn't—we don't believe that. It's just that it gets caught in the language of our rules more than anything else." This cannot satisfy the second prong of the *Cent. Hudson Gas & Elec. Corp.* test, as there was merely a speculative reason that the CPA Board denied the proposed name change. *See, e.g., Michel v. Bare*, 230 F.Supp.2d 1147, 1154 (D.Nev.2002) (State failed to show that a rule prohibiting an attorney from using the trade names "Your Legal Power" and "Su Poder Legal," directly advanced the State's interest).

Moreover, the CPA Board's emphasis on the addition of three letters, "RSM", ignored the addition of the words "Certified Public Accountants" to the end of the proposed name

change. Indeed, the proposed name of "RSM McGladrey & Pullen, LLP, Certified Public Accountants" when compared to "RSM McGladrey, Inc." would be less misleading than the current name of "McGladrey & Pullen, LLP." As McGladrey & Pullen points out, the word "McGladrey" has been used in both names for five years without prohibition, and there is no evidence that the public has been deceived by those names.

In sum, I would hold that the CPA Board's denial of McGladrey & Pullen's proposed name change impermissibly restricted McGladrey & Pullen's right to free speech under the First Amendment of the United States Constitution. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64, 100 S.Ct. at 2350-51, 65 L.Ed.2d at 349-50. Accordingly, I respectfully dissent from the majority opinion and would reverse the trial court's order.

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA COUNTY OF WAKE

[Filed March 18, 2004]

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03 CVS 7412

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

ORDER ON PETITION FOR JUDICIAL REVIEW

THIS PETITION FOR JUDICIAL REVIEW, coming on and being heard by the undersigned Judge Presiding on February 26, 2004, and the Court, having considered the evidence of record, the briefs and arguments of Counsel, the Court makes the following:

FINDINGS OF FACT

1. Pursuant to N.C.G.S. § 150B-51, no additional evidence was taken on the Petition for Judicial Review.

2. Pursuant to N.C.G.S. § 150B-46, the Petitioner did not except to any Findings of Fact and Conclusions of Law of the N.C. Board of CPA Examiners. Therefore, all Facts of the Declaratory Ruling are binding on this Court.

3. The Court conducted *de novo* review as to all issues except the issues of whether there was substantial evidence to

support the Declaratory Ruling and whether the decision is arbitrary and capricious.

4. Petitioner initiated the Request for the Declaratory Ruling and it submitted the request in the name of a currently licensed CPA firm, McGladrey & Pullen, LLP. Petitioner requested that the Board issue ". . . a Declaratory Ruling that under 21 NCAC 8N .0307 (CPA Firm names) McGladrey is entitled to change its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants."

5. The Record establishes that the Board had the jurisdiction and authority to issue its Declaratory Ruling and that the Declaratory Ruling was issued in accordance with the Board's regulations and G.S. 150B, the Administrative Procedure Act.

6. The Record establishes that the Board properly exercised its authority to consider to what or whom the prefix "RSM" refers. "RSM" does not stand for the names of former members of the CPA firm. The Petitioner does not own the name "RSM" but regards it as a brand name that will make it appear as large as some competitors. Indeed, and as stated *supra*, RSM stands for Robson Rhodes, a U.K. firm; Salustro Reydel, a firm in France; and McGladrey & Pullen, LLP. The Record indicated that either [sic] Robson Rhodes nor Salustro Reydel are licensed CPA firms in North Carolina nor any other United States territory.

7. Because these two entities are non-CPA firms, 21 NCAC 8N .0307(a) clearly prohibits the use of "RSM" in the title of the Petitioner CPA firm.

8. In addition, the Board's rules necessitate the examination of the composition and partnership structure of the entity in determining whether a proposed name is misleading or deceptive. See 21 NCAC 8N .0202.

9. Further, neither anything named "RSM" nor Rhodes nor Salustro are partners in the CPA firm.

10. The Record establishes that there is confusion among the public, employees, clients and state regulators about the differences between Petitioner and RSM McGladrey Inc., a non-CPA firm.

11. The Declaratory Ruling properly held that "Petitioner's proposed name 'RSM McGladrey & Pullen, LLP' is sufficiently similar to the name 'RSM McGladrey, Inc.' that it has the capacity or tendency to deceive as prohibited by the Board's Rules."

12. Petitioner argued that the Declaratory Ruling denied its right to Commercial Free Speech. The Court affirms the Declaratory Ruling and adopts the Board's conclusion that regulation of a fictitious brand trade name by a state is appropriate because the potential for public deception outweighed the interest of Commercial Free Speech.

13. The Board does not seek to otherwise prohibit Petitioner's truthful disclosure of its affiliation with "RSM International" in its advertising material.

14. Petitioner argued that the Declaratory Ruling was arbitrary and capricious and violated Equal Protection. The Court affirms the Declaratory Ruling because Petitioner failed to meet its burden of proof as to these two claims.

WHEREFORE, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

15. The Board had the jurisdiction and authority to issues its Declaratory Ruling.

16. The Board did not act in excess of its authority or jurisdiction.

17. The Declaratory Ruling was not affected by an error of law in its interpretation of the applicable statutes and regulations.

18. The Declaratory Ruling of the Board is supported by substantial evidence of Record.

19. The Declaratory Ruling does not violate the constitutional provisions cited in the Petition for Judicial Review.

20. The Declaratory Ruling is not arbitrary and capricious.

WHEREFORE, THE COURT GRANTS THE FOLLOWING RELIEF:

I. This Petition for Judicial Review was properly filed and duly accepted.

II. The Declaratory Ruling of the N.C. Board of Carolina State Board Of Certified Public Accountant Examiners is affirmed and adopted as the Order of this Court.

III. The Petition for Judicial Review is denied and dismissed.

ORDERED, ADJUDGED & DECREED this 18th day of March, 2004.

/s/ Orlando F. Hudson, Jr.
ORLANDO F. HUDSON, JR.
Superior Court Judge Presiding

APPENDIX D

DECLARATORY RULING

RE: 21 NCAC 8N .0307

PETITIONER: McGladrey & Pullen, LLP
3600 West 80th Street, Suite 500
Bloomington, Minnesota 55431-1002

DATE REQUEST RECEIVED: March 11, 2003

BACKGROUND INFORMATION:

Petitioner is a CPA limited liability partnership with office locations registered to do business in North Carolina. Petitioner requests a name change from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants."

QUESTION:

Can Petitioner use the letters "RSM" in changing the firm name from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants?"

CONCLUSION:

No. 21 NCAC 8N .0307 (a) states (in pertinent part), "A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive." The name of one or more former members of the CPA firm, as defined in 21 NCAC 8N .0301, may be included in the CPA firm name. The name of a non-CPA owner in a CPA firm name is prohibited. Additionally, 21 NCAC 8N .0307(b) provides that it is "considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership . . . when in fact there is no partnership. . . ." As Petitioner has confirmed, "RSM" in and of itself is not a person or entity, but a brand name. Currently, Petitioner is affiliated with a

non-cpa corporation named "RSM McGladrey, Inc." Petitioner is also affiliated with a network of service firms (including non-cpa firms) named "RSM International." RSM McGladrey, Inc., is a subsidiary of another non-cpa corporate entity although it employs CPAs and purports to offer "accounting" services to the public. Although Petitioner is part of an "Alternative Business Structure," neither RSM McGladrey, Inc., nor RSM International are partners in or otherwise have an equity interest in Petitioner.

As explained in 21 NCAC 8N .0202, "Deception includes . . . representations or omissions which a CPA either knows or should know have a capacity or tendency to deceive." Such conduct is prohibited whether or not anyone has been actually deceived. Regardless of intent, the use of "RSM" in the name of the firm would have the capacity or tendency to deceive the public by giving the impression that any firm using a name that begins with "RSM," regardless of the nature of the firm, is a lawful CPA firm. In reality, "RSM" firms may be involved in other business arrangements and lines of commerce that are forbidden to CPA firms and there is no assurance that all members of "RSM" are certified public accountants.

Another use of "RSM" in Petitioner's firm name with the capacity or potential for public confusion or deception is the simultaneous use of the nearly identical name by "RSM McGladrey, Inc." Even though RSM McGladrey, Inc., is not (and does not propose to be) a CPA firm in this state, it is closely associated with the Petitioner. For example, as explained in *Hoover's Company Capsule Database* (accessed April 16, 2003),

> "RSM McGladrey will gladly be your accounting firm, if you happen to be a mid-sized business. The company, which was created in 1999 when H&R Block acquired the non-attest assets and business of McGladrey &

> Pullen, has offices throughout the US. The company focuses on businesses in such industries as construction, health care, and manufacturing, offering such services as consulting, auditing, accounting, tax services, and international business services. *The company, through an alliance with McGladrey & Pullen and other accounting firms worldwide, offers clients in some 75 countries services under the RSM International name.*" [Emphasis added]

On the other hand, *Hoover's* described Petitioner as follows:

> "McGladrey & Pullen LLP provides audit and attest services, as well as certain tax and consulting services, from offices throughout the US. Services include bookkeeping, financial statement preparation, independent audits, and SEC filing assistance. The company also offers business planning, information technology, transfer tax, business tax consulting, and other services through an affiliation with H&R Block subsidiary RSM McGladrey, whose offices provide McGladrey & Pullen with global reach."

The importance of clearly delineating between duly authorized CPA firms and affiliated entities is essential to the preservation of the CPA firms' autonomy and independence. As this Board explained in its November 20, 2000, Interpretative Statement regarding "Alternative Business Structures":

> "A CPA firm and the related ABS shall ensure that the client and the public know that the two entities are separate and distinct in nature and operation so that neither the client nor the public are confused by the relationship between the CPA firm and the ABS."

Petitioner's proposed name "RSM McGladrey & Pullen, LLP" is sufficiently similar to the name "RSM McGladrey,

Inc." that it has the capacity or tendency to deceive as prohibited by the Board's Rules. As the Board's records indicate, the similarity is not only potentially confusing to the public, but actually confusing to Petitioner's own licensed staff members.

The fact that Petitioner might include the words "Certified Public Accountant" or "CPA" in its name would not solve that problem since there is no requirement that CPA firms use those words or letters in their names. (For example, 21 NCAC 8K .0201(c) provides: "The use of "CPA" or "Certified Public Accountant(s)" in the corporate name is encouraged, but not required.") Thus, although Petitioner might reduce potential public confusion by adopting the words "Certified Public Accountant" or the letters "CPA" as part of its firm name, this step only makes it clear that Petitioner is a CPA firm. It does not make it clear to the public that other "RSM" entities are NOT CPA firms.

The United States Supreme Court has held, *Friedman v. Rogers*, 440 US. 1, 59 L. Ed. 2d 100, 99 S. Ct. 887 (1979), that regulation of a trade name by the state was constitutionally permissible since the potential for public deception outweighed the interest of commercial free speech. The Board is not seeking to prohibit Petitioner's truthful disclosure of its affiliation with "RSM International," but only to disallow the use of "RSM" in the firm's name which is prohibited by the above-referenced rule.

Approved by the Board
April 28, 2003

/s/ O. Charlie Chewning Sr.
President

(2)

No. 06-197

FILED
OCT 10 2006
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SUPREME COURT, U.S.

In the Supreme Court of the United States

McGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a court must review *de novo* a state board of accountancy's finding that a proposed CPA partnership name including a third-party brand comprised of initials of non-partners has a capacity or tendency to deceive the public in that state, even though the finding was based upon substantial evidence and even though the Board also ruled that the firm could otherwise advertise its membership in the network of accounting and consulting firms that owned the brand.

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E Uniform Accountancy Act and Uniform Accountancy Act Rules, Rule 14-1(d), published jointly by the AICPA and the National Association of State Boards of Accountancy (3rd Edition, Nov. 2002) 64a

F *RSM Salustro Reydel, KPMG to Merge*, International Accounting Bulletin, Nov. 2004 ..... 66a

G RSM Robson Rhodes LLP, 2004 Annual Review, p. 55 . . . . . 68a

H RSM McGladrey, Inc.'s Motion to Dismiss Liquidating Trustee's Complaint With Prejudice, *Freeman v. McGladrey & Pullen, LLP*, No. 06-01381-AJC (Bankr. S.D. Fla. June 21, 2006) 70a

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SUMMARY OF REASONS TO DENY THE PETITION

McGladrey & Pullen, LLP ("Petitioner") is a member of a network of accounting and consulting firms that owns the brand "RSM." The network, RSM International, Inc. ("RSMI") asked Petitioner to adopt its brand in the partnership name. Pursuant to a Declaratory Ruling request under North Carolina's Administrative Procedure Act, Petitioner asked the North Carolina State Board of Certified Public Accountant Examiners ("the Board") for a ruling that the proposed partnership name of "RSM McGladrey & Pullen, LLP, Certified Public Accountants" does not have the capacity or tendency to deceive the public. As the requesting party, Petitioner presented evidence that: the brand belonged to an entity that was not authorized to be a Certified Public Accountant ("CPA") firm; the initials "RSM" included the initials of non-licensees as well as the initials of non-partners; the proposed name had not been previously used or formally approved in other states, prior to the proposed use of RSM, as a result of Petitioner's alternative practice structure; the SEC had insisted that Petitioner comply with special requirements; and the Petitioner's desire to use RSM was pursuant to a request of Petitioner's alternative practice structure affiliate. The record also shows that Petitioner's own employees were confused about for whom they worked; that the RSM network had no ownership and no responsibility or liability vis-à-vis the professional acts of Petitioner; and that Petitioner is a "legally independent and separate" audit firm surrounded by an alternative business structure ("ABS").

Based upon this information, the Board found that the proposed partnership name had the capacity or tendency to deceive the public, and would thus be contrary to the Board's rules on firm names. The Board nevertheless ruled that the Petitioner could truthfully advertise its actual relationship with the RSM network on its letterhead. On appeal, the North Carolina superior court, Court of Appeals, and Supreme Court

held that the Board's finding of deception was supported by substantial evidence, reviewed the questions of law *de novo*, and concluded that Petitioner's right of commercial speech had not been unconstitutionally restricted. The cases show that there is no justification for requiring the review of state boards' factual findings of deception regarding the names of professional firms to be the same evidentiary and review standards as required of blanket restrictions on political speech or religious freedom. Regardless, the record shows that the proposed name is deceptive to the public, courts, federal and state regulators, and even Petitioner's own employees. Despite Petitioner's demonstrably false characterization of the Board members as driven by self-interest and unqualified to consider the commercial challenges of national and international accountancy, the Board is qualified to decide if a hypothetical partnership name has a capacity or tendency to deceive the public in its state. Therefore, the Petition should be denied.

PETITIONER HAS FAILED TO PROPERLY IDENTIFY "CONSTITUTIONAL AND REGULATORY PROVISION[S] INVOLVED."

Petitioner's quote of Rule 21 NCAC 8N .0307 "in pertinent part" (Petition pp. 2-3) omits the following pertinent part:

> (c) Any CPA firm that has continuously used an assumed name approved by the Board prior to April 1, 1999, may continue to use the assumed name, so long as the CPA firm is only owned by the individual practitioner, partners, or shareholders who obtained the Board approval for the assumed name. A CPA firm (or successor firm by sale, merger, or operation of law) may continue to use the surname of a retired or deceased partner or shareholder in the CPA firm's name so long as that use is not deceptive.

21 NCAC 8N .0307(c) (emphasis added).

Petitioner also incorrectly implies that the only rule upon which the Board relied in its decision was Rule 8N .0307 (Petition p. 2). In fact, the Board specifically cited and discussed other rules, including, in particular, Rule 8N .0202, which states:

> Deception includes fraud or misrepresentation and representations or omissions which a CPA either knows or should know have a capacity or tendency to deceive. Deceptive conduct is prohibited whether or not anyone has been actually deceived.

(R. p. 80). Indeed, this important rule was not cited in the Petition.

Ironic and perhaps fatal, Petitioner failed to identify the Fourteenth Amendment as a "Constitutional and Regulatory Provision Involved." Indeed, the petitioner did not cite the Fourteenth Amendment anywhere in its entire petition.

THE PETITIONER'S "STATEMENT OF THE CASE" IS FLAWED BY UNSUBSTANTIATED AND FALSE ASSERTIONS.

Petitioner uses the initials "RSM" on its letterhead (App. 9a; R. p. 184), though it does not own the RSM brand (R. p. 25). The "R" in RSM stands for Robson Rhodes, a British partnership of chartered accountants. The "S" purportedly stands for Salustro Reydel, a French accounting firm, but Petitioner has failed to disclose that over two years ago, Salustro departed RSM. (*See* App. 66a-67a. Although not a part of the record below, this appears to be a highly relevant fact of which the Court should take notice.) Indeed, Salustro Reydel is no longer identified as a founding member of RSMI. (*See* App. 68a-69a. Also not part of the record in this matter, but worthy of notice since it appears that Petitioner did not inform the courts below of such pivotal changes contrary to its repeated assertions of fact on appeal.) The "M" stands for McGladrey (R. p. 50). Petitioner and Robson Rhodes (and formerly Salustro Reydel) are members of RSM International,

Inc., an international association of accounting and consulting firms which boasts that it is the sixth largest of such organizations in the world (R. pp. 50, 243). Like Robson Rhodes and Salustro Reydel, RSMI is not a licensed CPA firm (R. pp. 13, 190), and it does not require its members to be licensed CPA firms (R. p. 80).

Petitioner is associated with RSM McGladrey, Inc. (also a member of RSMI), through an alternative business structure ("ABS") (R. pp. 110, 265-66). Taken together, they are already the fifth largest accounting and consulting firm in the United States (R. p. 50). RSM McGladrey, Inc. is a wholly owned subsidiary of H&R Block and provides accounting, tax, and business consulting services, though it is not a CPA firm (R. pp. 50, 80). However, RSM McGladrey, Inc. employs CPAs who also work for Petitioner, (R. pp. 187-88) and many of these CPAs perform "non-attest" services (R. p. 192). Understandably, even some of these CPAs are confused as to the identity of their employer. (R. pp. 81, 186-87). Petitioner does not own the brand name "RSM." (R. p. 25).

In 1999, when Petitioner sought the Board's approval for its ABS arrangement, it promised that:

> McGladrey [McGladrey & Pullen, L.L.P.] and RSM will use separate logos, letterhead, business cards, signage, marketing and promotional materials, advertisements, etc. to establish and maintain legally separate identities and to facilitate public awareness that these are separate business entities with separate business services and operations. All materials will clearly display the business services of each entity so that the public is not misled.

(App. 14a; R. pp. 57, 131, 136, 263; emphasis added). Three years later Petitioner asked the Board to ignore prior promises and allow it to "adopt the prefix 'RSM' to conform to the branding standards of RSM International." (R. pp. 23, 215).

REASONS FOR DENYING THE PETITION

I. The Record does not support Petitioner's claim that the proposed name has been "approved" in other states.

Petitioner claims that North Carolina alone rejected its name change (Petition p.1). This statement is simply not accurate and Petitioner's own evidence contradicts it. Indeed, Petitioner's managing partner, William Travis, admitted at the Board hearing that regarding many states, "we don't know whether they have a problem." (R. p. 199) The letter purportedly requesting approval actually only stated: "If applicable in your state, we expect to file any required applications or formal notifications within the next several weeks." (R. p. 11).

II. Petitioner's assertion that the Board "produced no evidence for its position" is also without any basis in fact.

In its declaratory ruling, the Board cited its own records which indicate that the similarity between Petitioner's proposed name "RSM McGladrey & Pullen, LLP" and the name "RSM McGladrey, Inc." is not only potentially confusing to the public, but actually confusing to Petitioner's own licensed staff members (R. p. 81). In addition, the Board cited an excerpt from *Hoover's Company Capsule Database* in which RSM McGladrey advertises itself as an accounting firm and an affiliate of McGladrey & Pullen, LLP (R. p. 80). The Board also referred to its November 20, 2000 Interpretative Statement regarding "alternative business structures" which stated, "[a] CPA firm and the related ABS shall ensure that the client and the public know that the two entities are separate and distinct in nature and operation so that neither the client nor the public are confused by the relationship between the CPA firm and the ABS." (R. p. 81)

Petitioner did not at that time or subsequently offer any evidence to support its claim that the use of the initials "RSM" inserted in front of its partners' names in its CPA firm

partnership name would not lead clients, the public, regulators and even employee CPAs to be confused, misled or deceived. To the contrary, Petitioner's presentation, as well as information presented by Board staff, confirmed that:

- The proposed name belonged to another entity that was not authorized to be a CPA firm.
- The proposed name included the initials of non-licensees.
- The proposed name included the initials of non-partners.
- The proposed name had not been formally approved in other states or by the Public Company Accounting Oversight Board (*See* App. 1a-5a).
- Prior to the proposed use of "RSM," as a result of Petitioner's ABS arrangement, the SEC had insisted that Petitioner comply with special requirements (R. pp. 110-111).
- Petitioner's desire to use "RSM" was pursuant to a request of Petitioner's ABS affiliate (despite Petitioner's promise that it would not subordinate its judgment to non-licensees).
- Despite prior promises, the lines within the ABS were already so blurred that Petitioner's own employees were confused about for whom they worked.
- Petitioner's relationship with RSM was substantively different from its competition.
- RSM had no ownership and no responsibility or liability vis-à-vis the professional acts of Petitioner.
- Petitioner is a "legally independent and separate" audit firm surrounded by an ABS.

These are not the Board's "mere speculations" – these facts were offered as Petitioner's own evidence.

Further, Petitioner's characterization of the Board's grounds for denying its name change omits the fact that the Board quoted specific examples of the public being misled by

the name "RSM" (R. p. 80) and also omits the Board's concern that Petitioner is involved in an ABS. In fact, the Board stated that "[t]he importance of clearly delineating between duly authorized CPA firms and affiliated entities is essential to the preservation of the CPA firms' autonomy and independence." (R. p. 81) After quoting a part of the Board's published ABS guidelines, the Board found that:

> Petitioner has confirmed, "RSM" in and of itself is not a person or entity, but a brand name. Currently, Petitioner is affiliated with a non-CPA corporation named "RSM McGladrey Inc." ... Although Petitioner is part of an "Alternative Business Structure," neither RSM McGladrey, Inc., nor RSM International are partners in or otherwise have an equity interest in Petitioner.

(R. pp. 84-86)

III. Petitioner has incorrectly described the Board's ruling concerning the proposed name.

The proceeding at issue arose pursuant to a declaratory ruling and not a contested disciplinary ruling resulting from the denial of the requested name. Belatedly, Petitioner attempts to recast the procedural history of this matter. Although it is true that the North Carolina Board's staff had initially raised concerns about the proposed name, Petitioner chose not to initiate a "contested case proceeding" under the North Carolina Administrative Procedure Act. If it had done so, it would have been challenging the denial of an application for a change of name. In the alternative, Petitioner could have chosen to simply implement the name change at its own peril. If it had done so, and if the Board had then determined that there were appropriate grounds, the Board could have initiated a contested case proceeding under the state's Administrative Procedure Act. In that latter instance, the Board would have had the first burden of proof to establish that there was a violation of the Board's rules. Instead, Petitioner chose the declaratory ruling

route. Thus, Petitioner had the burden of establishing the facts. This requirement is common to declaratory ruling proceedings under most states' Administrative Procedure Acts and is entirely in line with the requirements of the Federal Administrative Procedure Act. 5 U.S.C. § 556 (B) ("except as otherwise provided by statute, the proponent of a rule or order has the burden of proof").

Petitioner was seeking a ruling that its proposed name was not "deceptive." The Board's rule prohibits deceptive firm names: "A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive." 21NCAC 8N .0307(a). Elsewhere the Board defines "deception" as follows: "A CPA shall not engage in deceptive conduct. Deception includes fraud or misrepresentation and misrepresentations or omissions which a CPA either knows or should know have a capacity or tendency to deceive. Deceptive conduct is prohibited whether or not anyone has been actually deceived." 21NCAC 8N.0202(a).

Petitioner has not challenged the constitutionality of any of the Board's rules nor the underlying statutes, nor, in particular, these rules regulating deception. Thus, as the rule clearly provides, Petitioner's burden in the declaratory ruling context was to show that the proposed name did not have "a capacity or tendency to deceive" regardless of whether or not "anyone has been actually deceived." Needless to say, the possibility of proving actual deception would be limited inasmuch as the declaratory ruling proceeding centered upon a proposed name that purportedly had never been used and thus ostensibly could not have actually deceived anyone. Simply put, Petitioner asked a hypothetical question, failed to meet its burden of establishing requisite facts, and now, disappointed with the answer it received, argues that a biased, parochial, and myopic board, worried only about potential competition, failed to introduce any "evidence" that the hypothetical name (which

Petitioner claimed it had not yet used) had already actually deceived someone.

When Petitioner complains of the lack of "evidence" before the Board, it must be remembered that Petitioner was the first to present at the declaratory ruling hearing. It did not offer sworn testimony but did present some documentary evidence and the unsworn statements of William Travis, managing partner for Petitioner. As N.C. Gen. Stat. § 150B-4(a) provides:

> (a) On request of a person aggrieved, an agency shall issue a declaratory ruling . . . as to the applicability of a given state of facts of a statute administered by the agency or of a rule or order of the agency. ... A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case.

N.C. Gen. Stat. § 150B-4(a).

IV. The Board was competent to make the determination as to whether or not a particular firm name was deceptive and was not biased; the petitioner did not challenge the Board for bias.

Petitioner's description of the individual members of the Respondent Board as parochial practitioners and potential competitors is false. On page 4 of its Petition, Petitioner touts its status as a "strong competitor" of the Big Four accounting firms and on page 23 asserts that "[t]he trend to nationalize and even internationalize accounting practices that petitioner seeks to follow here is in tension with the financial interests of many of the Board's members." These aspersions are not supported by the record and are contrary to fact. If Petitioner had the

slightest basis for believing that any member of the Respondent Board was in any way biased, there is a procedure under North Carolina law for excluding that Board member from participating.

At the time of the declaratory ruling hearing, the Board was composed of two "public" members, one of whom had worked for many years in a national finance and insurance firm. The Board also included five CPAs, one of whom was a retired managing partner of an international firm. The presiding officer was a managing partner of a different international CPA firm. Another Board member was national chair of the National Association of State Boards of Accountancy. Another was managing partner of a large regional firm. The fifth CPA member was, ironically, a former employee of the Petitioner who, at the suggestion of Petitioner's counsel, voluntarily recused himself from participation in the hearing and decision.

V. Petitioner has no protectable speech value in a deceptive brand.

Petitioner's proposed trade name does not convey any useful information and, therefore, is unprotected by the First Amendment. The current RSM International service mark was registered July 18, 2006. It is described as follows: "[t]he mark consists of the words 'RSM International' with the 'M' in 'RSM' written as a combination of the letter 'M' and '!'." RSM International Association, a Swiss corporation, owns this service mark. Although registration was only recently granted, RSM International filed the application for registration July 22, 2003. The previous RSM International mark was abandoned August 5, 1998 (App. 78a), although Petitioner continued to use it long after that date. Petitioner actually owned the mark. It was not owned by RSM International, Inc. (App. 78a).

The use of the RSM initials in Petitioner's proposed trade name does not convey any useful information to the public. Commercial speech that does not convey useful information to

the public is not protected by the First Amendment because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980) (citation omitted). Petitioner readily concedes it does not have the exclusive right to use the RSM initials. Yet it proposes to use those initials in its trade name so the public will identify it with RSM International. Whereas Petitioner is a CPA firm that provides only attest services, RSM International is a loose association of firms from around the world that provide a variety of services other than attest services. Moreover, Petitioner's only affiliation with RSM International is through RSM McGladrey, Inc., a firm that provides only non-attest services. Since the RSM initials are used by non-attest entities as well as entities in entirely unrelated industries and Petitioner has marketed attest services under its current trade name for a number of years, the RSM initials will not help the public identify Petitioner as a firm specializing in attest services. Petitioner's goal of promoting itself as a specialist in attest services will not be furthered by inserting those initials in its trade name. To the extent Petitioner wants to advertise its affiliation with RSM International, it can do so through media other than its trade name, such as its letterhead. Petitioner's proposed trade name, in short, deserves little, if any, commercial speech protection because it communicates no useful information to the public that cannot be communicated more accurately in a manner other than Petitioner's proposed trade name.

VI. This Court has never conducted an independent review of evidentiary findings of a state regulatory board where those findings were supported by "substantial evidence."

Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) involved the constitutionality of an attorney's claim to certification on his letterhead. In *Peel*, a plurality of this Court held that the First Amendment was violated by

prohibiting a lawyer from advertising his certification as a "trial specialist" on his letterhead. As noted by Petitioner, the court was divided.

Petitioner cites *Peel* to support the contention that the Supreme Court applies *de novo* review to state professional board decisions concerning the First Amendment. But as Petitioner admits, only the four-justice plurality in *Peel* sanctioned *de novo* review for First Amendment questions. Justices Marshall and Brennan concurred "in the plurality's holding that Illinois may not enforce a blanket prohibition barring petitioner from holding himself out as a civil trial specialist," but they made no mention of the standard of review that should be applied. (Petitioner admits this much, in a footnote on page 16—"while the concurrence did not expressly address the standard of review it applied, nothing in their disposition of the case indicates that they deferred to the Illinois Supreme Court findings.")

Regardless, *Peel* can be distinguished from the present case since the commercial speech at issue in *Peel* was unquestionable- the attorney had in fact received certification as a "trial specialist" by the National Board of Trial Advocacy. Indeed, the Attorney Registration and Disciplinary Commission of Illinois did not include "any statement as to whether petitioner's representation was deceptive" in its "findings of facts." In contrast, the record in *McGladrey* unequivocally establishes that "RSM" is not a partner in McGladrey and Pullen, LLP, and the purported affiliation was no more than an "association." Ironically, the Board expressly permitted the truthful assertion of Petitioner's relationship with RSM on its letterhead in much the same way as the plurality in *Peel* allowed to the extent that "the facts stated on [the] letterhead are true and verifiable, and there has been no finding of actual deception or misunderstanding." Like *Edenfield v. Fane*, 507 U.S. 761 (1993) (Petition pp. 16, 17, 22, 28) and *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S.

136 (1994) (Petition pp. 18, 27, 28, 30), *Peel* is further distinguishable because it involved a disciplinary case.

Petitioner also details a number of circumstances where this Court has chosen to apply "independent judgment" in reviewing First Amendment cases (Petition pp. 20-21). However, as with the state supreme court cases cited by Petitioner, all but two of the cases on pages 20-21[1] of its Petition involved non-commercial speech, and "independent judgment" in review of issues such as obscenity and the presence of fighting words. As recognized by this Court, commercial speech is entitled to "protection somewhat less extensive than that afforded 'noncommercial speech,'" protection that is "commensurate with its subordinate position in the scale of First Amendment values... [and] subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 637 (1985); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995). As such, the non-commercial speech cases cited on pages 20-21 are subject to more rigorous judicial review.

Petitioner cites *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973): "[T]his Court recognized that such pecuniary incentives were sufficiently powerful to prohibit members of the Alabama Board of Optometry from participating in license revocation proceedings of optometrists practicing in a competing branch of the profession. Similar concerns support the application of *de novo* review here." However, *Gibson* is sharply distinguishable from the instant facts. As noted in *Friedman v. Rogers*, 440 U.S. 1 (1979), *Gibson* stands for the right to "a fair and impartial hearing in any disciplinary

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[1] *Virginia State Bd. of Pharmacy v. Virginia State Consumer Council, Inc.* 425 U.S. 748 (1976); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

proceeding conducted against him by the Board." *Friedman* at 19. In *Gibson* and another case,

> disciplinary proceedings had been instituted against the plaintiffs, and the courts were able to examine in a particular context the possibility that the members of the regulatory board might have personal interests that precluded a fair and impartial hearing of the charges. ... In contrast, Roger's challenge to the fairness of the Board does not arise from any disciplinary proceeding against him.

Friedman at 18. Petitioner was not participating in a disciplinary hearing; thus, any concern over "pecuniary incentives" is irrelevant. Petitioner is appealing a declaratory ruling, so any interests at stake are merely speculative.

Petitioner also cites *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). In *Zauderer*, the state of Ohio challenged an attorney's newspaper article, which promised that a potential client would owe no legal fees if they did not win their case. The attorney was soliciting clients to litigate drunk driving and Dalkon Shield cases, and the advertisement included illustrations. This Court held that while the attorney could not be disciplined for soliciting clients through nondeceptive advertising, the advertisement was misleading because it claimed that a losing client would owe "no legal fees;" while in truth clients would be liable for litigation costs. *Id.* at 652.

Additionally, this Court upheld a Florida state bar rule in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995). Petitioner cites this case to support the proposition mentioned in the paragraph above, that the Court "first satisf[ies] itself that the record justified the restriction" when upholding board decisions. *See* Petition p.18. Petitioner cites *Went for It* because the Court in that case "scour[ed] the record," which included a two-year study by the Florida Bar on the issue presented in the case. The two-year study concerned the subject of the case,

a ban on soliciting accident victims by mail within 30 days of their accidents.

The Court in *Went for It* cited the record on a number of occasions, but the majority also stated, "because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values." *Id.* at 635. In light of congressionally acknowledged state board regulation, the same reasoning should apply in the present case.

VII. There is no basis for requiring a *de novo* review of a finding of a specific proposed firm name's capacity or tendency to deceive when that finding is supported by substantial evidence.

Petitioner phrases the question presented as "[w]hether a court reviewing a state professional regulatory board's decision that prohibits allegedly misleading commercial speech should review the record *de novo* to determine whether the speech is misleading and the prohibition is constitutional." This question ignores the substantive issue that is at the heart of this case: whether 21 NCAC 8N .0307, as applied to Petitioner, violates the free speech clause of the First Amendment. If the Court concludes that Petitioner's free speech rights were not violated by the Board's decision to deny its request for a name change, it does not matter that the lower courts applied a deferential standard of review because the result would have been the same had they applied a more stringent standard of review.

In defamation cases, this Court has held that a finding of actual malice must be reviewed *de novo*. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984). It has also applied *de novo* review in obscenity cases while acknowledging that the questions of what appeals to the

prurient interest and what is patently offensive are questions of fact. *Miller v. California*, 413 U.S. 15, 25-30 (1973). The reason for an exacting standard of review is that these so-called findings of fact determine whether the speech in question is protected by the First Amendment at all. *Bose Corp.*, 466 U.S. at 511. We are dealing with a similar finding of fact here since misleading commercial speech is not protected by the First Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

Petitioner's argument entirely misses the point. Even if the lower courts had applied *de novo* review, they would have concluded that Petitioner's proposed trade name was misleading and therefore beyond the protection of the First Amendment. The case of *Friedman v. Rogers*, 440 U.S. 1 (1980), is squarely on point. In *Friedman*, a Texas statute prohibited the practice of optometry under an assumed name, a trade name, or a corporate name. *Id.* at 5-6. The Court held that the comprehensive ban on trade names was a constitutionally permissible state regulation in furtherance of the state's substantial interest in protecting the public from the deceptive and misleading use of optometrical trade names. *Id.* at 15. In so holding, this Court acknowledged that "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality." *Id.* at 12-13. It is these "ill-defined" associations of trade names with price and quality information that make trade names vulnerable to manipulation by those who use trade names and therefore potentially misleading to the public. *Id.*

The regulation upheld in *Friedman* was a comprehensive ban on the use of trade names. In contrast, Title 21, section 8N.0307(a) of the North Carolina Administrative Code only proscribes the use of trade names that have "the capacity or tendency to deceive." When compared to the Texas statute at

issue in *Friedman*, the North Carolina rule is narrowly tailored to the state's interest in ensuring that the public is not misled. Since it is well-settled that the First Amendment does not protect commercial speech that has "the capacity or tendency to deceive," *Central Hudson*, 447 U.S. at 566, the North Carolina rule does not infringe upon protected speech. For this reason, Petitioner cannot and does not argue that section 8N.0307(a) is unconstitutional on its face.

Rather, Petitioner argues that the Board has unconstitutionally applied section 8N .0307(a) to it in this particular case. Petitioner's argument centers around two distinct questions: first, whether the proposed name "RSM McGladrey & Pullen, LLP, Certified Public Accountants" is misleading; and second, who decides whether it is misleading. The first question is dispositive because if the Court concludes as a matter of law that Petitioner's proposed trade name is misleading, the Court will have no need to address the second question. In *Friedman*, the Court concluded that all trade names are potentially misleading and upheld Texas's blanket prohibition on trade names. If the Board could constitutionally ban the use of all trade names by CPAs, whether misleading or not, the courts should certainly give it some leeway in applying a rule that only prohibits misleading trade names. *Friedman*, which appears to stand for the proposition that all trade names are potentially misleading as a matter of law and therefore unprotected by the First Amendment, is squarely on point and should compel the Court to hold in favor of the Board.

Petitioner relies on *In re R.M.J.*, 455 U.S. 191 (1982) for the proposition that the Board's ruling violated its free speech rights. The lawyer in *In re R.M.J.* was disciplined for violating Missouri rules of professional conduct that prohibited attorneys from publishing advertisements listing areas of practice not specifically listed in the rules, and required an attorney listing areas of practice to include a disclaimer of certification. *Id.* at 198. The rules at issue in *In re R.M.J.* also prohibited a lawyer

from listing the courts in which he was licensed to practice and from mailing announcement cards to persons other than lawyers, clients, former clients, friends, or relatives. *Id.* Unlike the present case, *In re R.M.J.* involved a substantive challenge to these blanket restrictions on certain types of lawyer advertising. In stark contrast to the lawyer in *In re R.M.J.* who could not even list the jurisdictions in which he was licensed to practice in his advertisements, Petitioner is not prohibited from advertising its affiliation with RSMI through media other than its trade name.

Petitioner also places a great deal of emphasis on the seminal case of *Virginia State Bd. of Pharmacy v. Virginia State Consumer Council, Inc.*, 425 U.S. 748 (1976). That case involved a First Amendment challenge to a Virginia statute prohibiting pharmacists from advertising the prices they charged for prescription drugs. *Id.* at 749. Like the other cases Petitioner cites, *Virginia Pharmacy* struck down a blanket restriction on the advertisement of truthful information that was not misleading. *Id.* at 773. However, in the instant situation, the Board is only protecting the public from deception through the enforcement of a narrowly drawn rule directed at misleading trade names.

VIII. Petitioner's misunderstanding of the fundamental issues of this matter is exemplified by its failure to recognize the Fourteenth Amendment as a provision involved in this litigation.

Petitioner invokes the First Amendment of the U.S. Constitution as the basis for its claim. (Petition p.2) However, the Petition fails to mention the Fourteenth Amendment, though presumably Petitioner understands that it is the means by which the First Amendment is applicable to the states. *See McGladrey v. N.C. State Bd. of CPA Exam'rs*, 171 N.C. App. 610, 614 (2005). As recognized in other First Amendment decisions by this Court, the First Amendment is applied to the

states through the due process clause of the Fourteenth Amendment. *See Schneider v. State*, 308 U.S. 147, 160 (1939) ("The freedom of speech and of the press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the Fourteenth against abridgement by a state.") As per this Court's procedure, the constitutional provisions "involved in the case" must be "set out" in any petition for a writ of certiorari. S. Ct. R. 14(1)(f).

IX. North Carolina's substantial evidence standard does not conflict with the decisions of other state Supreme Courts.

Petitioner argues that review of state board decisions is *de novo* when "First Amendment challenges are raised to a state board or agency ruling." Petition p.13. To this end, Petitioner cites five state supreme court decisions as evidence of an unsettled area of case law in need of resolution and clarification by this Court. Unfortunately for Petitioner, out of the five cases, commercial speech is only at issue in one; namely, *Appeal of Sutfin*, 693 A.2d 73 (N.H. 1997). None of Petitioner's other four state court decisions actually pertain to commercial speech.

Among the four extraneous state supreme court cases, only three actually address the First Amendment guarantee of freedom of speech. *See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist*, 807 A.2d 847 (Pa. 2002) (applying *de novo* review to the question of whether an eighth grader's website constituted a "true threat"); *see also Lesiak v. Ohio Elections Comm'n*, 716 N.E. 2d 773 (Ohio App. 1998) (applying review when determining whether a social club improperly solicited a donation from a candidate for public office); *see also Smith v. Alabama Aviation & Technical Coll. (Ex Parte Smith)*, 683 So. 2d 431 (Ala. 1996) (affirming a lower court's decision to bar rehearing of plaintiff's claim that he was fired for exercising his right to free speech at defendant college). Petitioner also relies on a case concerning freedom of religion, rather than

freedom of speech. *Johnson v. Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W. 2d 74 (Iowa), *cert. denied sub nom. Pruessner v. Benton*, 474 U.S. 1033 (1985) (upholding a school board's enforcement of compulsory school attendance law against a religious sect).

Aside from the irrelevance of freedom of religion and non-commercial speech cases to the instant case, further distinctions can be drawn. All four of the just-mentioned decisions were punitive, either taking away a right which the defendant had an established stake in, or punishing the defendant for behavior that had occurred in the past. In contrast, Petitioner is challenging the Board's review of a purely hypothetical question, with no tangible loss of property or liberty.

Petitioner argues that it has been this Court's practice to apply *de novo* review in "the full range of free speech cases." To this end, Petitioner cites cases such as *New York Times v. Sullivan*, 376 U.S. 254 (1964), seeking to establish the importance of such review when free speech is at issue. *Sullivan*, however, is not a commercial speech case. This Court has established a different standard of constitutional protection for commercial and non-commercial speech: "certain features of commercial speech differentiate it from other varieties of speech." *State Bd. of Pharmacy v. Virginia State Consumer Council, Inc.*, 425 U.S. 748, 772 (1976). Thus, commercial speech is "less likely than other forms of speech to be inhibited by proper regulation." *Id.* at 775. This Court has warned that "our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area." *Friedman v. Rogers*, 440 U.S. 1, 12 (1979).

Therefore, to answer Petitioner's question about the standard of review to be granted in a non-commercial free speech case, the most useful resource would be a commercial speech case before this Court, involving a state board ruling on deceptive trade names. Fortunately, there is exactly such a

case, *Friedman v. Rogers*, 440 U.S. 1 (1979). The situation in *Friedman* is quite similar to the facts of the instant case. Rogers, an optometrist, appealed a decision by the Texas Optometric Association, claiming that the Board's prohibition of certain types of trade names was unconstitutional. The trial court held the Board's rule unconstitutional, but this Court reversed that holding.

While *Friedman* only appears once in Petitioner's reasons for granting its Petition, in a footnote on page 19, the case contains striking parallels to the instant situation, and sheds light on the question at hand. Petitioner's reference to *Friedman* acknowledges that this Court found "substantial and well demonstrated" state interests to uphold the Board's decision, and we would also add that this Court chose to not engage in a *de novo* review of the facts when deciding the case. Petitioner relies on two Supreme Court cases decided a few years before *Friedman*, citing them as examples of occasions when the Supreme Court reviewed and overturned Board decisions. Both cases are addressed and distinguished in *Friedman*. In *Virginia State Bd. of Pharmacy v. Virginia State Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court held unconstitutional a Virginia law prohibiting Virginia pharmacists from advertising the price of prescription drugs. In *Bates*, this court struck down an Arizona law prohibiting attorney advertising. *Bates v. State Board of Arizona*, 433 U.S. 350 (1977). However, in *Friedman*, this Court distinguished the situations in both cases from the analysis necessary when a trade name, rather than advertising, is at issue.

Petitioner highlights language in *Virginia Pharmacy* emphasizing the importance of "the free flow of commercial information." Petition p.21, *see also Virginia State Bd.*, 425 U.S. 748 at 765. In response, we draw this Court's attention to *Friedman*'s lengthy analysis of *Virginia Pharmacy*, distinguishing the two cases. When reviewing *Virginia Pharmacy* in the *Friedman* decision, this Court noted that "[a]t

issue in *Virginia Pharmacy* was the validity of Virginia's law preventing advertising by pharmacists of the prices of prescription drugs. ... To individual consumers, information about prices of prescription drugs at competing pharmacies 'could mean the alleviation of physical pain or the enjoyment of basic necessities.'" *Friedman*, 440 U.S. at 8 (quoting *Virginia Pharmacy*, 425 U.S. at 764). Thus, the "free flow of commercial information" in *Virginia Pharmacy* was "of general public interest." *Virginia Pharmacy*, 425 U.S. at 764. This Court found such necessity not at issue in *Friedman*, nor is there a need for free flowing commercial information in the instant situation.

Petitioner also relies heavily on *Bates*. However, this reliance is misplaced. Even this Court's interpretation of the First Amendment in *Bates* "clearly does not prohibit the state from insuring that the stream of commercial information flow cleanly as well as freely." *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1970).

This Court in *Friedman* distinguished *Bates* and *Virginia Pharmacy*, based on the issue at hand: advertising is at issue in *Bates* and *Virginia Pharmacy*, versus trade names in *Friedman* (and *McGladrey*). In *Friedman*, this Court distinguished trade names as "a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates*." *Friedman*, 440 U.S. at 12. While advertisements are "self-contained and self-explanatory," trade names "convey no information about the price and nature of the services offered by an optometrist until [they] acquire meaning over a period of time by association formed in the minds of the public." *Id.* Therefore, "because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public." *Id.* at 12-13. Thus, as explained in *Friedman*, Petitioner's reliance on *Bates* and *Virginia Pharmacy* is misplaced.

Petitioner in this case is attempting to change its name to reflect an affiliation with RSM International, Inc. (Petition p.3). Although Petitioner urges (without the benefit of record evidence) that it would be subject to quality control standards observed by RSMI, the quality of that "affiliation" is no more than association membership standards. As Petitioner's managing partner stated at the Board hearing: "And our international association is - - is literally an association. It has no jurisdiction over the individual firms other than they can boot you out if certain things don't happen." (R. p. 181). Unlike the so-called "Big Four," there is no international partnership. "...[I]t's an association, and we just changed it within the last couple of years to Sweden or someplace like that. But it is - - it's an association, is really what it is." (R. p. 182). Similarly, in *Friedman*, defendant Rogers admitted that he had "no control whatsoever" over "office policy routines." *Friedman*, 440 U.S. at 13.

The rules regarding trade names at issue in *Friedman* were much stricter than the rules guiding North Carolina's certified public accountants. Texas optometrists could not practice under "any assumed name, corporate name, trade name, or any name other than the name under which [he or she] is licensed to practice optometry in Texas." *Friedman*, 440 U.S. 1 at 5. In contrast, North Carolina's rule, rather than barring whole categories of names, limits names which "would have the capacity or tendency to deceive." 21 NCAC 8N .0307(a). Again, unlike in Texas, partnerships and corporations are allowed, as long as their names do not "tend to imply the existence of a partnership or professional corporation.... when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm." *Id.* Despite the rigidity of the rules imposed on Texas optometrists, the Court in *Friedman* upheld the limits on trade names.

In addition to upholding trade name restrictions of a much stricter nature, this Court in *Friedman* upheld the Board's rule

regarding trade names with much more dire consequences to the plaintiff than are at issue here. Rogers, the defendant optometrist, owned eighty-two offices, all using the name "Texas State Optical." He was advertising each shop under that name, and had a vested commercial interest in the name. *Id.* at 14-15. In contrast, Petitioner has no established interest in the proposed name that it is seeking to use, as it is not yet practicing under that name anywhere. Further, unlike the licensee in *Friedman*, Petitioner does not even own the proposed brand "RSM."

X. The proposed name is deceptive.

In addition to Petitioner's own evidence of confusion and deception, cited above, Petitioner's desire to reflect an "affiliation" with RSM McGladrey, Inc. by way of a name change communicates a more formal relationship between Petitioner and RSMI than the record supports. However, this affiliation is refuted by Petitioner's own statements, made in April 2006. In its Petition, Petitioner seeks a name change to reflect its "*affiliation* with RSM International, Inc." (emphasis added) (Petition p.3). Again on page 5 of the Petition, Petitioner describes the relationship between itself and RSM McGladrey as an "affiliation." Petitioner seeks the name change to "better inform the public of its *affiliation* with" RSM McGladrey (emphasis added). *Id.*

While Petitioner is eager to characterize its relationship with RSM McGladrey, Inc. in its petition filed before this Court on August 4, 2006, Petitioner completely denied the existence of any affiliation just four months before. In April 2006, Petitioner and RSM McGladrey, Inc. were defendants in a case before the Southern District of Florida's Bankruptcy Court. Responding to opposing counsel's claim that Petitioner was an affiliate of H&R Block (which owns RSM McGladrey, Inc.), the H&R Block spokesman responded that "McGladrey & Pullen [Petitioner] has a complementary strategic

relationship with RSM McGladrey, an H&R Block affiliate." But he claimed that "the two firms are separate and independent legal entities." *Accounting Firm Sued on Securities Law Violation Charge*, Dow Jones Newswire, 14 April 2006; App. 76a-77a.

Likewise, in the case before the bankruptcy court, attorneys for RSM McGladrey and Petitioner were eager to remind the court that the two firms are "distinct legal entities." (App. 72a.) Indeed, RSM McGladrey and Petitioner argued that plaintiffs' pleadings were insufficient as a matter of law because plaintiffs refused to treat the two firms as "distinct entities." *Freeman v. McGladrey & Pullen, LLP*, No. 06-01381-BKC-AJC-A Bankr. S.D. Fla. June 21, 2006); *See* App. 72a & 74a. Petitioner bases its claim for a name change on its affiliation with RSM McGladrey; but perhaps before it made this claim it should have decided whether it truly wished to be affiliated or not. There was also evidence in the record that the use of "RSM" was confusing and misleading to the SEC (App. 6a-8a) and courts (App. 26a & 39a).

XI. Petitioner's allusions to its own "sophisticated clients" overlook the real "public" in "certified public accountant."

The real "public" to be protected by state boards of accountancy is not merely Petitioner's purportedly "sophisticated client." Yet, throughout its petition, Petitioner makes reference to its clients as "the public." In the realm of accountancy regulation, "the public" is more than an individual CPA or CPA firm's own clients; the term refers to the public at large who may have no privity of contract with the CPA or CPA firm but nevertheless rely upon the CPA or CPA firm's work in the attest arena. A concise definition of the "public" in "certified public accounting" was provided by the President of the National Association of State Boards of Accountancy (NASBA) in an address at the Baruch College of the City University of New York:

> The Professional Standards of the AICPA [American Institute of Certified Public Accountants] state it succinctly: "A distinguishing mark of a profession is acceptance of its responsibilities to the public." The difficult task is pinpointing the definitions of the different publics.
>
> Others have described the public interest as the "collective well-being of the community." This community consists of government, employers, investors, creditors, and the business community. Additionally, the CPA has a responsibility as well as potential liability, to third parties who do not engage the CPA for his or her services.

David A. Costello, Accounting, Ethics and the Public Interest, Saxe Lectures in Accounting (March 15, 1999) at http://newman.baruch.cuny.edu/DIGITAL/saxe/saxe_1999/costello_1999.htm.

Third party reliance upon a CPA's work is also discussed in a treatise on professional ethics for CPAs published in the 1950s:

> Since the multitude of third parties who may rely on the reports of certified public accountants are not likely to know the CPAs personally, this means that they must have confidence in CPAs as such-in the accounting profession generally-as men who can be trusted to do a good job for all concerned.

John Carey, Professional Ethics of Certified Public Accountants 5 (1956).

This Court recognized the importance of the attest function as performed by CPAs to third parties when it observed in *John Nuveen & Co. v. Sanders*, 450 U.S. 1005, 1010 n. 4 (1981), that "[r]eliance upon facially unexceptionable certified financial statements, as to the correctness of the financial data shown therein, is essential to the proper functioning of securities marketing, to the trading in securities, to the lending

of money by banks and financial institutions, and to the reliance by stockholders on the reports of their corporations."

The agencies charged with protecting the public are the CPA Boards of the various states and territories of the United States. The Respondent Board, for example, has promulgated Rule 8N.0201, which states that "the reliance of the public in the business community on sound financial reporting and advice on business affairs, imposes on the accounting profession an obligation to maintain high standards of technical competence, morality and integrity." The Uniform Accountancy Act also stresses the reliance placed upon the work of CPAs by the public. "Not only does the expression of opinions on financial statements call for the greatest breadth and most intense development of the professional skills employed by CPAs, but it invites the highest degree of reliance by the widest segment of the public." U.A.A. § I-2 (2005).

XII. Despite Petitioner's aspersions, Congress expressly acknowledges the important role that state boards can and must play in public protection in this arena.

State boards exist to protect the public from unscrupulous accounting firms; they ensure that these firms meet federal standards for commercial speech, or the professional standards created in the Sarbanes-Oxley Act of 2002. [116 Stat. 745] Petitioner is of the opinion that state regulatory boards are granted too much deference in the area of commercial speech regulation. (Petition p. 19 *et seq.*) However, Congress takes a different view and has delegated to state boards the responsibility for regulating national and international accounting firms. The Sarbanes-Oxley Act of 2002 highlights the important role that state boards play in public protection in this arena. Sarbanes-Oxley Act of 2002, 116 Stat. 745. Section 209 of the Act instructs state boards to "make an independent determination of the proper standards applicable" when "supervising nonregistered public accounting firms."

The Act creates a federal Public Company Accounting Oversight Board to supervise implementation of the new accounting standards, yet even this federal Board is required to report its findings to state boards. *See* Sarbanes-Oxley Act Section 104(c)(2); Sect. 104(g)(1); Sect. 105(b)(4)(ii)(III), and, most significantly, Sect. 105(d)(1)(b). The critical complementary role state boards play was again highlighted in Congress' recent passage of the Financial Services Regulatory Relief Act of 2006, which included a provision exempting CPAs from the Gramm-Leach-Bliley Act's annual privacy notice requirement. This exemption "... is possible because CPAs are certified or licensed by state board's of accountancy and subject to state laws and regulations prohibiting disclosure of non-public personal information without the expressed consent of the client." AccountingWEB.com Oct-2-2006, quoting Barry C. Melanson, President and CEO of the American Institute of Certified Public Accountants.

XIII. Petitioner is actually challenging the constitutionality of the Board's rules and North Carolina's Administrative Procedure Act.

Having consistently failed to do so at any time below, Petitioner nevertheless suggests that this Court review the constitutionality of the Board's factual determination that Petitioner's proposed name had a "capacity or tendency to deceive" despite the substantial evidence standard for such factual determinations mandated by the state's Administrative Procedure Act. N.C. Gen. Stat. § 150B-51(b)(5). Such a collateral act is not only without merit, but late. "It was very early established that [the Supreme] Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

XIV. The Board's ruling is narrowly drawn and promotes public access and understanding.

As required under *Central Hudson*, the regulation at issue is in direct correlation with the governmental interest, that of public protection. 447 U.S. at 563. The regulations as set forth in 21 NCAC 8N .0307 describe situations that have the tendency to deceive and mislead the public and the law expressly prohibits those situations. The rule specifically contemplates and prohibits the use of the name of a non-CPA owner or any name that would imply a partnership relationship. Without such rules, even savvy members of the public may be confused about ownership, the relationship between the parties in the named entity, and fiduciary responsibilities of persons listed therein.

Consistent with *Central Hudson*, the Board's regulation is no more extensive than necessary to serve the interest. Here, the Board's rules only prevent Petitioner from using the false partnership name, including the fictional "RSM" along with real present or former partners. The Board ruling does not prevent Petitioner from accurately informing the public as to Petitioner's relationship with the RSM entities.

Specifically, the Board informed Petitioner that nothing in the Board's rules prevents Petitioner from truthfully identifying itself as "affiliated with" or part of a "network" with RSM International or RSM McGladrey, Inc. (R. pp. 235-236). Indeed, the last sentence of the Board's Declaratory Ruling states that "[t]he Board is not seeking to prohibit Petitioner's truthful disclosure of its affiliation with 'RSM International,' but only to disallow the use of 'RSM' in the firm's name which is prohibited by the above-referenced rule." (R. pp. 84-86).

CONCLUSION

There are compelling public policy reasons for keeping the licensed CPA firm independent from the unlicensed corporation in appearance and in fact. As the record shows, even though Petitioner is not and cannot be more formally

connected with the unlicensed business, it wants to trade upon its fictional brand name. It is equally clear that the unlicensed entity is already being misperceived as a "public accounting firm." The adverse implications of the confusion are best understood by contrasting some of the legal differences between the CPA firm and its unlicensed "affiliate": Petitioner is licensed; undergoes a peer review; is majority owned and controlled by licensees; is independent, and its members are individually liable for professional negligence. RSM McGladrey, Inc. and RSM International, Inc. are not.

These differences between the Petitioner and RSM McGladrey, Inc., as well as RSMI, are substantive and deeply entwined in the same compelling public protection issues that have dominated the business headlines for the last four years. When, as the record shows, the public, employees, clients and even courts and regulators are already misled and confused about the differences between these business entities, the Board is justified in expecting the Petitioner to honor its promise to "facilitate public awareness" (App. 14a) and to "inform all of its attest clients that it is not a part of RSM and that McGladrey and its partners are solely responsible for the work of the CPA firm." (App. 18a)

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

NOEL L. ALLEN
Counsel of Record
M. JACKSON NICHOLS
ALLEN AND PINNIX, P.A.
333 FAYETTEVILLE STREET,
SUITE 1200
RALEIGH, NORTH CAROLINA 27601
919-755-0505
Counsel for Respondent

APPENDIX A

Registered Public Accounting Firms
as of 09/30/2003

The Public Company Accounting Oversight Board has approved the registration applications of the accounting firms listed below.

Registrant	Headquarters Office Location
Ahearn, Jasco & Company, P.A.	Pompano Beach, FL
Anchin, Block & Anchin LLP	New York, NY
Anness, Gerlach & Williams, Inc.	Youngstown, OH
Anton Collins Mitchell LLP	Denver, CO
Aronson & Company, A Professional Corporation	Rockville, MD
Arthur F. Bell, Jr. & Associates, L.L.C.	Hunt Valley, MD
Ary, Roepcke & Mulchaey, P.C.	Columbus, OH
Barfield Murphy Shank & Smith PC	Birmingham, AL
Battelle & Battelle LLP	Dayton, OH
Berenfeld Spritzer Shechler & Sheer, CPA's	Miami, FL
Broussard, Poche', Lewis & Breaux, L.L.P.	Lafayette, LA
Burton McCumber & Cortez, L.L.P.	Brownsville, TX
Carter & Balsam, A Professional Corporation	Van Nuys, CA
Carter, Cartier, Melby & Guarino,	St. Petersburg, FL

CPAs, P.A.	
Cipolla Sziklay, L.L.C.	West Orange, NJ
Corbin & Company, LLP	Irvine, CA
Crowe, Chizek and Company LLC	South Bend, IN
Cuthill & Eddy LLC	Winter Park, FL
Dabbs, Hickman, Hill & Cannon, LLP	Statesboro, GA
Demetrius & Company, LLC	Wayne, NJ
DiRocco & Dombrow, PA	Fort Lauderdale, FL
Divine, Scherzer & Brody, Ltd.	Minneapolis, MN
Dunn Creswell Sparks Smith Horne & Downing PLLC	Union City, TN
Dworken, Hillman, LaMorte & Sterczala P.C.	Shelton, CT
Earl M. Cohen, C.P.A., P.A.	Boca Raton. FL
Eisner & Lubin LLP	New York, NY
Eisner LLP	New York, NY
Ferlita, Walsh & Gonzalez, P.A.	Tampa, FL
Freeman & Davis LLP	New York, NY
Gelfond Hochstadt Pangburn, P.C.	Denver, CO
George Johnson & Company, P.C.	Detroit, MI
Gibbons & Kawash, AC	Charleston, WV
Goldstein, Lewin & Company, P.A.	Boca Raton, FL
Grant Thornton LLP	Chicago, IL
Greenberg & Company LLC, CPA's	Springfield, NJ
Guest & Company, P.C.	Tulsa, OK
Gumblner, Savett, Finkel Fingleson & Rose, Inc.	Santa Monica, CA
Hacker, Johnson & Smith PA	Tampa, FL
Haft & Gluckman, Certified Public Accountants LLP	New York, NY
Hannis T. Bourgeois, LLP	Baton Rouge, LA
Hays & Company LLP	New York, NY
Heard, McElroy & Vestal, LLP	Shreveport, LA
Helin, Donovan, Trubee &	Austin, TX

Wilkinson, LLP	
Henjes, Conner, Williams & Grimsley, LLP	Sioux City, IA
Hixson, Marin, DeSanctis & Company, P.A.	North Miami Beach, FL
HJ &Associates, LLC	Salt Lake City, UT
Holthouse Carlin & Van Trigt LLP	Santa Monica, CA
Holtz Rubenstein & Co., LLP	Melville, NY
House Park & Dobratz, P.C.	Kansas City, MO
Hutchinson and Bloodgood LLP	Glendale, CA
J. W. Hunt and Company, LLP	Columbia, SC
Jewett, Schwartz & Associates	Hollywood, FL
Jones & Kirkpatrick, P.C.	Birmingham, AL
Kabani & Company, Inc.	Fountain Valley, CA
Kim & Lee Corporation, CPA'S	Los Angeles. CA
Kraft Bros., Esstman, Palton & Harrell, PLLC	Nashville, TN
Lane Gorman Trubitt, L.L.P.	Dallas, TX
Lefkowitz, Garfinkel, Champi & DeRlenzo P.C.	Providence, RI
Lightfoot Guest Moore & Co., P.C.	Dallas, TX
Mah & Associates, LLP	San Francisco, CA
McGladrey & Pullen, LLP	Bloomington, MN
McKennon, Wilson & Morgan LLP	Irvine, CA
Meaden & Moore, Ltd.	Cleveland, OH
Miller Ray & Houser LLP	Atlanta, GA
Moore Stephens Lovelace, P.A.	Winter Park, FL
Moore Stephens Tiller LLC	Atlanta, GA
Most Horowitz & Company, LLP	New York, NY
Natherson & Company, P.A.	Sarasota, FL
Nussbaum Yates & Wolpow, CPA's, P.C.	Melville, NY
O'Connor Davies Munns & Dobbins, LLP	New York, NY
Oppenheim & Ostrick, CPAs	Culver City, CA

Osburn, Henning and Company, C.P.A.'s, P.A.	Orlando, FL
Pannell Kerr Forstar PC	Fairfax, VA
Pender Newkirk & Company, CPAs	Tampa, FL
Peterson & Co., LLP	San Diego, CA
Philip Vogel & Co., PC	Dallas, TX
Piltz, Williams, LaRosa (A Professional Association)	Biloxi, MS
PKF, Certified Public Accountants, A Professional Corporation	Los Angeles, CA
PKF, Certified Public Accountants, P.C.	New York, NY
Pugh & Company, P.C.	Knoxville, TN
Pustorino, Puglisl & Co., LLP	New York, NY
Quick & McFarlin, P.C.	Omaha, NE
Radin, Glass & Co., CPA, LLP	New York, NY
Rayburn, Betts & Bates, P.C.	Nashville, TN
Robert N. Clemons, CPA, PA	DeLand, FL
Ronald R. Chadwick, P.C.	Aurora, CO
Roy Chenevert, CPA	Baton, Rouge, LA
Rubin, Brown, Gornstein, & Co., LLP	St. Louis, MO
Russell Bedford Stefanou Mirchandani LLP	McLean, VA
Salberg & Company, P.A.	Boca Raton, FL
Saltz, Shamis & Goldfarb, Inc.	Solon, OH
SantoraBaffone CPA Group	Newark, DE
Sanville & Company	Abington, PA
Scharf Pera & Co., PLLC	Charlotte, NC
Schumacher & Associates, Inc.	Denver, CO
Shatswell, MacLeod & Company, P.C.	West Peabody, MA
Shearer, Taylor & Co., P.A-	Ridgeland, MS
Simon Lever & Company	Lancaster, PA
Smith, Carney & Co., P.C.	Oklahoma City, OK

Spence, Marston, Bunch, Morris & Co.	Clearwater, FL
Squar, Milner, Reehl & Williamson, LLP	Newport Beach, CA
Sullivan Bille, P.C.	Tewksbury, MA
Sutton Frost Cary LLP	Arlington, TX
Sweeney, Gates & Co.	Fort Lauderdale, FL
T. E. Lott and Company, A Professional Association	Columbus, MS
Thomas Leger & Co., LLP	Houston, TX
Thomas W. Klash, C.P.A.	Hollywood, FL
Thompson, Greenspon & Co., P.C.	Fairfax, VA
Trlen Rosenberg Rosenberg Weinberg Ciullo & Fazzari, LLC	Morristown, NJ
Turlington and Company, L.L.P.	Lexington, NC
Turner, Stone & Company, L.L.P.	Dallas, TX
Walden Certified Public Accountant, P.A.	Boca Raton, FL
Waters, Wright & Associates, LLP	Mansfield, TX
Wipfli Ullrich Bertelson LLP	Wausau, WI

APPENDIX B

Excerpts of Examples of RSM McGladrey referenced as auditor
(copied from SEC Edgar filings)

COMPANY: SURETY CAPITAL CORP
TICKER: SRYP
EXCHANGE: OTH

FORM-TYPE: 10-Q

DOCUMENT-DATE: June 30, 2003
FILING-DATE: August 19, 2003

ITEM 3. CONTROLS AND PROCEDURES

Based upon an evaluation within the 90 days prior to the filing date of this report, the Company's Chief Executive Officer and Principal Financial Officer concluded that the Company's disclosure controls and procedures are effective. There have been no significant changes in the Company's internal controls or in other factors that could significantly affect the Company's internal controls subsequent to the date of the evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses. The Company engaged RSM McGladrey, Inc., a public accounting firm, to test its systems of internal controls. The Internal audit is scheduled to commence in August, 2003.

COMPANY: SPIEGEL INC
TICKER: SPGLA

EXCHANGE: OTH

FORM-TYPE: 8-K
Exhibit 99. Additional Exhibits

FILING-DATE: September 12, 2003

MBIA added that "the assets the credit card receivables are not being serviced properly. A due diligence audit conducted by RSM McGladrey, Inc. for MBIA concluded that ... 'collection efforts were not evident for the vast majority of delinquent accounts selected.' ... Servicing must be active and aggressive in order to have performing sub prime assets. If this is not done, ... decline in pool quality is severe and quick."

Edgar - SEC Filing re

COMPANY: EPLUS INC
CROSS-REFERENCE: MLC HOLDINGS INC
TICKER: PLUS
EXCHANGE: NMS

FORM-TYPE: 8-K
Exhibit 99. Additional Exhibits

FILING-DATE: 1uly 25, 2003

SECOND AMENDED AND RESTATED CREDIT AGREEMENT Among ePlus inc. And its Subsidiaries Named Herein And Certain Banking Institutions Named Herein With NATIONAL CITY BANK As Administrative Agent BRANCH BANKING AND TRUST OF VIRGINIA As Syndication Agent BANK OF AMERICA, N.A. As Documentation Agent dated as of July 21, 2003

...

4.2 Conditions to First Loan. In addition to the conditions to all Loans as provided in ss. 4.1, the obligation of each Bank to make its first Loan hereunder is conditioned upon the following: ...

(o) Collateral Field Audit. The Administrative Agent shall have received a collateral field audit of the Borrowers prepared by RSM McGladrey.

APPENDIX C

See Fold-Out Exhibit

Letter from William D. Travis to Robert N. Brooks dated July 7, 1999 (page 1)

EXHIBIT

3

RECEIVED

JUL - 9 1999

NORTH CAROLINA STATE
BOARD OF CPA EXAMINERS

McGLADREY&PULLEN, LLP
Certified Public Accountants and Consultants

RSM
International

July 7, 1999

Robert N. Brooks
Executive Director
North Carolina State Board of CPA Examiners
Suite 104
1101 Oberlin Road
Raleigh, NC 27605-2827

Dear Mr. Brooks:

The purpose of this letter is to provide you with information concerning the recently announced transaction involving H&R Block, Inc.'s (Block) acquisition of the non attest practice of McGladrey & Pullen, LLP (McGladrey). The asset purchase agreement providing for such transaction was signed on June 28, 1999 and closing is expected to occur on or about August 2, 1999.

Block will pay $240 million for the McGladrey non attest practice over four years. Block is also assuming McGladrey's pension liabilities, estimated at $50 million, and will make additional payments to McGladrey's partners based upon future performance.

McGladrey believes that the transaction affords it access to the capital and other resources to become the largest national CPA and consulting firm serving the needs of middle market and emerging growth entities and their owners. Block believes that its acquisition of McGladrey's non attest practice will diversify its current dominant tax return business, which is targeted to medium income individuals. This transaction also allows Block to pursue growth opportunities in the middle market corporate segment. Block and McGladrey do not have, nor do they expect to have, an agreement providing for the distribution of Block's financial services or products to McGladrey clients. If there are any future distribution agreements, any such agreement will be commercially reasonable and consistent with other vendor arrangements.

In furtherance of the transaction, Block will use a newly formed subsidiary, which it expects to name RSM McGladrey, Inc. (RSM). RSM will legally own and control the non attest assets and business acquired from McGladrey. Block plans to merge the operations of the non attest firms it previously acquired into RSM over the course of the next year or so. Block expects that future acquisitions of non attest firms will be made by RSM on behalf of Block.

Firmwide Resources-Bloomington
3600 W. 80th Street, STE 500
Bloomington, Minnesota 55431-1082
(612) 835-9930 FAX (612) 921-7702

Worldwide
Services
Through
RSM International

The foregoing structure is the intended consequence of a transaction which was designed to create legally distinct and independent service organizations which separately provide attest and non attest services and which meets the stringent state regulations and professional standards. McGladrey and Block desire to maintain the ability of McGladrey to continue its reputation as a respected CPA firm performing attest services for the middle market and emerging growth segments. The transaction and structure is designed to ensure that McGladrey will retain the autonomy, resources, policies, controls and processes necessary to maintain high standards of professional competence, integrity, objectivity and independence and its ability to deliver a high quality service.

Please consider the following information.

Separate Legal Entity

McGladrey will continue in its present legal structure as a limited liability partnership that is wholly owned by the individual CPA partners. No other persons or entities will have a direct or indirect financial interest in McGladrey. Substantially all existing McGladrey partners will remain as partners and McGladrey will remain autonomous and have separate operations from RSM and Block. Specifically, RSM, Block and their affiliates will not have an ownership interest in McGladrey nor a Board or management position with McGladrey.

McGladrey will maintain its current public accounting licenses in the jurisdictions in which it operates. The individual CPA partners will maintain their individual CPA licenses in the states in which they are located and other states where they provide services. After the closing of the transaction, McGladrey will only provide attest services (e.g., audit,

attest, accounting and review and all other services for which standards have been established by the Auditing Standards Board or the AICPA Accounting and Review Services Committee) and certain income tax and other services that fall within the definition of public accounting in certain states. Hence, and moat significantly, after the closing, McGladrey's practice will be limited to the practice of public accounting.

McGladrey will have a Board of Directors of six CPA partners, as elected by the McGladrey partners. The McGladrey Board members will not be involved in the RSM Board of Directors, Advisory Board or senior management. The existing CEO and COO of McGladrey will resign and terminate as partners and the current Executive Partner- Audit and Accounting will become the now CEO of McGladrey. The McGladrey Board will have sole and exclusive responsibility for all decisions affecting McGladrey, including the following-

- Oversight of the partnership agreement.
- Selecting the CEO.
- Overseeing the practice policies relating to quality, risk containment, independence, integrity and objectivity of the attest practice and for those other services specifically defined as the practice of public accountancy in the various jurisdictions.
- Approval of partner promotion, evaluation, compensation and termination.
- Establishing and approving the annual financial budget.
- Approval of the McGladrey strategy.

McGladrey will have the full and exclusive authority to manage its attest practice operations, including the use of separate arrangement letters, setting fees, approving billings, establishing annual budgets and maintaining separate books and records. Additionally, McGladrey will be financially

independent and will bear the risk of loss for the services provided. Consistent with their separate and independent status, RSM will not be responsible for McGladrey's pre- or post-closing professional services. McGladrey, however, will maintain substantial levels of professional liability insurance at its sole cost. McGladrey will acquire "claims made" coverage, as available, in amounts which equal or exceed its preclosing coverage.

To fund working capital needs, McGladrey will enter into a five year revolving line of credit agreement with RSM. This financing agreement will include commercially normal and reasonable terras including positive and negative covenants and security interests to protect RSM.

RSM will have a five member board of directors, with three seats filled by Block and two seats filled by Mark Scally and Tom Rotherham, the current (but resigning at closing) CEO and COO of McGladrey. RSM will also have a six member Executive Management Committee comprised of the RSM CEO, COO and four other RSM employees. Scally will be the CEO and Rotherham will be the COO of RSM. Scally and Rotherham will not be partners nor management of McGladrey after closing of the transaction. No McGladrey partner will be a member of the RSM Board. RSM will only provide certain income tax, accounting, and consulting services not specifically defined as the practice of public accounting in a particular jurisdiction and will not perform any public accounting services.[1]

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[1] The practice of public accounting is defined in the AICPA's Code of Professional Conduct, which states "The practice of public accounting consists of the performance for a client, by a member or a member's firm, while holding out as CPA(s), of the professional services of accounting, tax, personal financial

Employees

All current and future partners and senior managers of McGladrey (all of which will be CPA's) will also be employees of RSM, using the title of managing director. All other professional staff that are CPA's, or who want to become a CPA, will be employees of McGladrey (they will not be employees of RSM). As a result, all audit, tax and financial consulting personnel that are holding themselves out as CPA's or are performing public accounting services will be partners or employees of McGladrey. Non attest consulting personnel (e.g. information technology and human resources consultants) and certain non-CPA tax personnel (e.g. tax lawyers), administrative and support personnel will only be employees of RSM.

McGladrey will retain the sole and exclusive authority and responsibility for all personnel policies relating to its professional staff and partners, including all decisions with respect to hiring, evaluation, compensation, training, promotion and termination. The McGladrey National Office of Audit and Accounting (NA&A) is responsible for establishing the annual CPE plan for attest services personnel, for developing and reviewing all related CPE course materials and for the delivery of the attest training. This commitment to CPE will be renewed and intensified.

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planning, litigation support services, and those professional services for which standards are promulgated by bodies designated by Council, such as Statements of Financial Accounting Standards, Statements on Accounting and Review Services, Statements on Standards for Consulting Services, Statements on Governmental Accounting Standards and Statement on Standards for Attestation Engagements."

The RSM managing directors will have an employment agreement with RSM that includes provisions relating to employment term, responsibilities and duties, compensation and benefits, confidentiality, non solicitation and termination. McGladrey and RSM will have identical benefit plans, except that the managing directors will receive incentive stock options from Block, with initial grants averaging approximately 1,275 shares per managing director.

Separate Identities

McGladrey and RSM will use separate logos, letterhead, business cards, signage, marketing and promotional materials, advertisements, etc. to establish and maintain legally separate identities and to facilitate public awareness that these are separate business entities with separate business services and operations. All materials will clearly display the business services of each entity so that the public is not misled. McGladrey will use a tag line below its name clearly identifying the firm as "Certified Public Accountants." RSM will add a tag line below its name to clearly identify the specialization of the particular service or individual, for example, RSM McGladrey, Inc. "Information Technology Solutions" or "Human Resources Solutions". Additionally, RSM's literature and correspondence to potential clients will clearly communicate that it is not licensed to engage in the practice of public accountancy.

There will not be any contractual arrangement to transfer profits between McGladrey and RSM. The partners of McGladrey and the managing directors of RSM will be compensated based upon the financial results of the two entities, similar to the way partner compensation was determined prior to the transaction with Block. The transaction provides that the partners and managing directors

will receive compensation of approximately 64% of the annual net earnings of McGladrey and RSM, which is similar to historical McGladrey partner income from operations (excluding return on tangible and intangible capital). Block will receive the remaining 36% of the annual net earnings of McGladrey and RSM.

Partner compensation will be established and approved exclusively by the McGladrey Board. RSM managing director compensation will be established and approved exclusively by the RSM management and Board. The compensation programs ensure that McGladrey partners and RSM managing directors receive separate compensation from McGladrey and RSM at the fair value of the services rendered to and on behalf of each entity. The foregoing compensation programs eliminate any economic incentive to favor RSM over McGladrey or vice versa.

Administrative Services and Employee Outsourcing

McGladrey will engage RSM to provide leased facilities, office equipment, computer equipment and support services under an Administrative Services Agreement (ASA). The ASA will be for a term of five years and may be terminated by either party for cause or other specified reasons. RSM will not provide any services to McGladrey that would be construed as public accountancy services. The ASA covers a broad range of back office activities and other infrastructure resources, including tho following services:

- Provision and maintenance of suitable office space.
- Provision and maintenance of computer hardware, software and other data processing activities and resources.
- Provision and maintenance of office equipment.

- Provision of nonprofessional staff, administrative personnel, secretarial staff and other clerical personnel.
- Assistance in the maintenance of books and records.
- Assistance in annual profit planning and budgeting, including the provision of budgeting systems.
- Scheduling and payment of accounts payable.
- Provision of billing services.
- Assistance in collection of accounts receivable.
- Preparation of payroll and related tax matters.
- Assistance in regulatory compliance matters.

The ASA is designed to be a typical outsourcing arrangement. The fees charged in the ASA are designed to reflect the fair value of the services, infrastructure, systems and other resources provided by RSM to McGladrey and include a fixed monthly amount plus a ratable share of common overhead costs (determined annually by mutual agreement of RSM and McGladrey).

Consistent with McGladrey's obligation of confidentiality, RSM will cause its employees that provide outsourcing services to McGladrey to maintain the confidentiality of McGladrey's clients. The McGladrey arrangement letters will include a paragraph requesting client permission for RSM personnel to have access to client records and other confidential information in order to provide outsourcing services under the ASA. No RSM employee will provide public accounting services.

RSM will provide certain income tax compliance and planning services to its clients. RSM will outsource such tax services to McGladrey CPA's under an annual arrangement letter between RSM and McGladrey. RSM's arrangement letters issued to its clients for tax services will clearly indicate RSM's intent to outsource the services to McGladrey and seek

approval for McGladrey personnel to have access to confidential client information. McGladrey will bill RSM at an agreed upon rate for the professional staff involved which will be based upon the fair value of the outsourced services provided by McGladrey personnel.

Separate Client Arrangements and Billings

McGladrey and RSM will utilize separate arrangement letters issued on their own letterhead for the attest and non attest engagements with clients.

McGladrey and RSM will bill clients separately for services on invoices bearing their respective letterhead. The collection of cash on billings will be separately accounted for and will be deposited in the separate accounts of each entity.

Independence

The various transaction agreements between McGladrey, RSM and Block provide that McGladrey will retain its current independence and relationship policies, which exceed the minimum requirements of the AICPA Rules of Conduct and the various SEC rules and interpretations. To assure that McGladrey's independence is not impaired, even in the most remote and tangential manner, RSM has agreed to comply, and cause its employees to comply, with these policies and to provide McGladrey with the authority and ability to monitor and enforce compliance with such policies within RSM. Specifically, RSM and its professional employees will not:

- Enter into certain specified prohibited relationships with any of McGladrey's attest clients, including loans extensions of credit, deposit relationships, qualified or non qualified plan management where RSM is a fiduciary

under ERISA, investment advisory and/or broker/dealer services,

- Own directly or indirectly any securities of the attest client.

Block has also agreed to comply, and cause its employees to comply, with AICPA Interpretation 101-14 and to cooperate fully with McGladrey in monitoring its compliance. For McGladrey's SEC clients, Block has agreed to comply with the SEC's more rigorous positions until such time as the ISB has completed its rulemaking in this area. At that time, Block has agreed to comply with the ISB's requirements.

Additionally, McGladrey will:

- Not perform any attest services for RSM or Block and its affiliates.
- Not accept any attest engagement with an entity or person for whom Block has a prohibited relationship or has provided a prohibited service.
- Not give or accept, directly or indirectly, commissions or referral fees for services within the definition of the practice of public accounting.
- Inform all of its attest clients that it is not a part of RSM and that McGladrey and its partners are solely responsible for the work of the CPA firm.

McGladrey has consistently updated its CPA professionals regarding changes in independence standards through a variety of means, including periodic informational releases and its CPE program. McGladrey has a comprehensive independence questionnaire and annual survey process to ensure that new hires and current staff and partners are in compliance with the Firm's independence and relationship policies. These policies and procedures will continue without exception.

Quality Assurance

McGladrey will also maintain its current policies and procedures designed to assure the delivery of quality attest services to its clients. McGladrey has a comprehensive Quality Assurance Policy which is supported by numerous attest services policy and procedures. Substantially all of these manuals are available to McGladrey personnel in electronic format on Lotus Notes to provide for easy access and timely updates. These manuals are continually updated for changes in professional standards and Firm policies and interpretations.

Compliance with these policies and with professional standards are tested annually in the Firm's rigorous interoffice inspection program. Additionally, the Firm is a member of the AICPA SEC Practice Section and has a peer review performed by Ernest & Young, LLP (E&Y) every three years. E&Y issued an unqualified opinion for the peer review cycle ended in 1998.

RSM and Block have agreed to fully cooperate in all practice monitoring activities of McGladrey, as well as any other regulatory investigations (e.g., SEC, QCIC or state regulatory investations).

We trust you will find that the structure presented above provides for the continuance of McGladrey as an autonomous CPA firm capable of meeting stringent state regulations and professional standards. This structure is designed to maximize McGladrey's ability to confront the future of the attest profession by providing quality attest services delivered within the spirit of objectivity, integrity and independence. Please call me at 612-921-7780 if you have questions or need further information.

Sincerely,

/s/ William D. Travis
William D. Travis
Executive Partner- Audit and Accounting

WDT:sgh

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

No. C99-3070-MWB

[Filed August 31, 2001]

RONALD J. BLANCHET,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FIRST AMERICAN BANK GROUP, LTD,	)
	)
Defendant.	)
	)

JUDGES: MARK W. BENNETT, CHIEF JUDGE, U. S. DISTRICT COURT, NORTHERN DISTRICT OF IOWA.

ORDER AND MEMORANDUM OPINION REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Following the termination of his employment, plaintiff Ronald J. Blanchet brought this action against his former employer, defendant First American Bank Group, Ltd., alleging age and gender discrimination in violation of state

and federal law, and a state common-law claim of retaliatory discharge, in violation of Iowa public policy, for refusing to participate in defendant's filing of an allegedly fraudulent insurance claim. First American Bank Group, Ltd. seeks summary judgment on all of Blanchet's claims.

I. INTRODUCTION

A. Procedural Background

Plaintiff Ronald J. Blanchet ("Blanchet") filed his complaint in this employment discrimination and retaliatory discharge lawsuit on September 16, 1999, following his termination from his position as Chief Financial Officer ("CFO") with defendant First American Bank Group, Ltd. ("FABG") on December 31, 1998. Blanchet alleges his dismissal was in violation of both federal and Iowa law, and his complaint avers four causes of action. Specifically, Cause of Action A contends FABG terminated Blanchet because of his age and, consequently, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq. Cause of Action B alleges sex discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. Cause of Action C alleges Blanchet's treatment and termination because of his age and sex constituted an unfair employment practice under the Iowa Civil Rights Act ("ICRA"), Iowa Code Ch. 216. And finally, Cause of Action D alleges Blanchet's termination was retaliatory and in violation of Iowa public policy because it resulted from Blanchet's refusal to participate in the filing of an allegedly fraudulent disability insurance claim on behalf of FABG's former president and Chief Executive Officer (CEO), William Gibb.

On January 24, 2001, FABG moved for summary judgment on each of Blanchet's claims.[1] FABG argues summary judgment is appropriate for several reasons, asserting primarily that Blanchet was terminated because he was not fulfilling his duties as CFO. More specifically, FABG contends Blanchet has failed to establish a *prima facie* case of age and sex discrimination because Blanchet cannot show that, at the time of his termination, he was performing his job at a level that met FABG's legitimate expectations. In addition, even if Blanchet could establish a *prima facie* case of discrimination, FABG argues Blanchet did not raise a question of fact as to whether FABG's stated legitimate justification for Blanchet's termination was pretextual and, consequently, did not create a reasonable inference that a protected characteristic was a determinative factor in his termination. Lastly, FABG argues that the Iowa public policy exception to the employment at will doctrine does not apply to the instant case because Blanchet's mere impression of a conversation, without more, does not rise to the level of a violation of public policy. And furthermore, because a discharge is not unlawful under this cause of action unless the public policy consideration is the determinative factor in a plaintiffs termination, FABG argues that its legitimate reasons for dismissing Blanchet preclude a finding in his favor.

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[1] When addressing Blanchet's age and sex discrimination claims in its memorandum in support of its motion for summary judgment, FABG focused solely on the federal claims arising under the ADEA and Title VII, respectively. However, because the analyses are essentially identical under the ICRA, the court assumes that FABG also intended to move for summary judgment on Blanchet's Cause of Action C, which alleges a violation of the ICRA based on age and sex discrimination.

Blanchet opposed FABG's motion and filed a resistance on June 13, 2001.[2] Blanchet asserts he generated genuine issues of material fact on all of his claims, particularly on the issues of whether he was qualified to perform his job and whether FABG's articulated legitimate reasons were pretextual. FABG filed a reply on July 16, 2001.

In its original motion, defendant requested, and the court granted, oral arguments on this motion for summary judgment, which took place telephonically on August 28, 2001. Plaintiff Blanchet was represented at these arguments by Michael J. Carroll of Coppola, Sandre, McConville & Carroll P.C., West Des Moines, Iowa. Defendant FABG was represented by Neven J. Mulholland of Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C., Fort Dodge, Iowa.

B. Factual Background

The court will discuss here only the nucleus of undisputed facts and such of the disputed facts as are necessary to provide a factual background for the legal analysis of the defendant's motion for summary judgment rather than attempt to provide an exhaustive dissertation of the undisputed and disputed facts of this case. In its legal analysis, the court will address in greater detail, where necessary, Blanchet's assertions of genuine issues of material fact that may preclude summary judgment in the defendant's favor.

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[2] Blanchet initially failed to file a timely response to FABG's motion for summary judgment. However, in the interests of justice, this court extended the deadline for plaintiff's response or resistance (Doc. No. 31) in lieu of disposing of the motion pursuant to N.D. Iowa LR 7.1(f), which provides that "if no timely resistance to a motion is filed, the motion may be granted without prior notice from the court."

Blanchet began his career with the defendant in 1981. At that time, he was employed by the defendant's predecessor, The State Bank in Fort Dodge, Iowa as an auditor and accountant. In 1982, a one bank holding company was formed, and the bank's name was changed to First American Bank, Fort Dodge (hereinafter Fort Dodge bank). During his tenure with the Fort Dodge bank, Blanchet received good performance evaluations and ultimately progressed to the position of comptroller. When the holding company acquired four new banks in 1994, the name of the company was changed to First American Bank Group, Ltd. ("FABG"). In October of 1994, Blanchet left his employment at the Fort Dodge bank to become Vice President and Chief Financial Officer ("CFO") of FABG. Blanchet was the company's first CFO, and he held this position until he was terminated on December 31, 1998.

In May or June of 1995, FABG's president and Chief Executive Officer, William Gibb, was diagnosed with cancer. Mr. Gibb was covered by several disability insurance policies. Despite the existence of those policies, however, Mr. Gibb continued to receive his full annual salary and retained the title of CEO after his diagnosis even though his ability to work was, at best, sporadic because of the severity of his illness and the side-effects of his treatments. Mr. Gibb passed away on December 21, 1996. Sometime prior to Gibb's death, he allegedly had a conversation with Thomas Schnurr ("Schnurr"), the current president and CEO of FABG, in which Gibb told Schnurr that he (Gibb) had asked Blanchet to process Gibb's disability claims in order to reimburse the company for the salary he had been drawing while ill. Schnurr told Tom Kregel ("Kregel"), Gibb's immediate successor as president and CEO, about this conversation with Gibb. After Gibb's death, Kregel approached Blanchet and asked him whether Gibb had requested that he process Gibb's disability

claims. The parties agree that this conversation took place and that Blanchet denied having been instructed by Gibb to file any insurance claims. The parties part ways, however, in their impression of the intent behind this questioning: Blanchet claims Kregel approached him "with a wink and a nod" and that it was clear to Blanchet that Kregel was, in reality, asking Blanchet to falsify information in order to explain FABG's delayed filing of Gibb's disability claims and, consequently, in order recover under those policies. FABG asserts that no unlawful intent undergirded Kregel's questioning of Blanchet. Instead, FABG argues Kregel was merely asking Blanchet, in reliance on credible information from Schnurr, whether Blanchet had indeed been instructed to file Gibb's claims.

Until 1997, Blanchet was the sole employee in FABG's accounting department. In April of 1997, Cindy Burke ("Burke") was promoted to assistant vice president of FABG from her previous position as vice president of commercial lending at the Fort Dodge bank. She reported to both Blanchet and another executive vice president, Lois Pannkuk ("Pannkuk"). While FABG contends it informed Blanchet in October of 1997 that he would eventually be dismissed, Blanchet claims he did not ultimately learn of his termination until October of 1998. He was discharge on December 31, 1998, and in January of 1999, Burke replaced him as the CFO of FABG. At this time, Burke was thirty years old, and Blanchet was forty-seven.

The nucleus of the disputed facts in this case centers on whether FABG ever informed Blanchet of his alleged shortcomings and whether there existed any nefarious intent behind questioning Blanchet about filing Gibb's insurance claims. While FABG points to a management study conducted by an independent organization, namely McGladley & Pullen, as objective evidence that Blanchet was a poor communicator

and mediocre manager with an inability to look at the "big picture," Blanchet cites his most recent performance evaluation in 1997, which was satisfactory, as evidence that he was adequately performing his job. In October of 1997, Blanchet was given a raise of $1700 for 1998. At this same time, his subordinate, Burke, was given a raise of $10,000. Blanchet claims this evidences age and sex discrimination, especially in light of Blanchet's satisfactory performance review only two months later in December of 1997.

In 1998, prior to Blanchet's dismissal but after Burke was promoted to the holding company, FABG initiated the Scout Talent Program. Whether this was intended to weed out older males, as Blanchet contends, or to identify potential employees for advancement within the company, as FABG contends, is unclear. However, the parties agree that this program was aimed at identifying non-officer employees, particularly women, for additional training. Blanchet argues that this program is evidence of a company-wide policy of replacing older male workers with younger females.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. No. 1 v. City of Sioux Center*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*,

531 U.S. 820, 121 S. Ct. 61, 148 L. Ed. 2d 28 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). The essentials of these standards are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(a)-(c)(emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material

fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394.

2. The parties' burdens

Procedurally, the moving party, here FABG, bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also Rose-Maston*, 133 F.3d 1104 at 1107; *Reed v. Woodruff County*, Ark., 7 F.3d 808, 810 (8th Cir. 1993). "When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Rather, the party opposing summary judgment, here Blanchet, is required under Rule 56 (e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040, 118 S. Ct. 1336, 140 L. Ed. 2d 498 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511

(8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same).

3. Summary judgment in employment cases

Because this is an employment discrimination and retaliation case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus.*, Inc., 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L. Ed. 2d 774 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) ("summary judgments should only be used sparingly in employment

discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson*, 931 F.2d at 1244; *see also Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, "because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford*); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

However, not long ago, the Eighth Circuit Court of Appeals also observed that, "although summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.) (observing

that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied*, 528 U.S. 818, 120 S. Ct. 59 , 145 L. Ed. 2d 51(1999). More recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), the Supreme Court reiterated that "'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 142 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).[3] Thus, what the plaintiff's evidence must show, to avoid summary judgment or judgment as a matter of law, is "'1, that the stated reasons were not the real reasons for [the plaintiffs] discharge; and 2, that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge.'" 530 U.S. at 153 (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that, to meet this burden, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added).

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[3] In *Reeves*, the Supreme Court was considering a motion for judgment as a matter of law *after* a jury trial, but the Supreme Court also reiterated that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Therefore, the standards articulated in *Reeves* are applicable to the present motion for summary judgment.

These special cautions seem to the court to be no less applicable here to Blanchet's state-law claims, because such claims also often depend upon inferences of the employer's motive, as is shown by application of the same burden-shifting analysis to retaliation claims as courts employ in discrimination cases. *See Moschetti v. Chicago, Central & Pacific R. Co.*, 119 F.3d 707, 709 (8th Cir. 1997) ("The order and allocation of the burden of proof in [a retaliation case under 42 U.S.C. § 2000e-3(a)] is laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *accord Manning v. Metropolitan Life Ins. Co.*, Inc., 127 F.3d 686, 692 (8th Cir. 1997); *Jackson v. Delta Special Sch. Dist. No. 2*, 86 F.3d 1489, 1494 (8th Cir. 1996). Similarly, the Iowa Supreme Court has applied the burden-shifting analysis to common-law retaliation claims: The plaintiff must first establish a *prima facie* case of retaliatory discharge by showing protected activity, adverse employment action, and a causal connection between the two; the burden then shifts to the employer to state a legitimate reason for its action; finally, the plaintiff must demonstrate that the employer's reason is pretextual. *See, e.g., City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996); *Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995); *Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989) (*Hulme I*).

With these standards in mind, the court turns to consideration of the specific grounds upon which FABG seeks summary judgment on each of Blanchet's claims of discriminatory or retaliatory discharge.

B. Age Discrimination Claim

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Because, in order to recover under the ADEA, a plaintiff must show the employer's decision was actually motivated by age, proof often depends on inferences, rather than on direct evidence. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). Likewise, because "there will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983), the Eighth Circuit Court of Appeals employs the *McDonnell Douglas* framework to analyze ADEA claims that are based principally on circumstantial evidence. *See, e.g., Hindman v. Transkrit Corp.*, 145 F.3d 986, 990-91 (8th Cir. 1998); *Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1251 n. 2 (8th Cir. 1997) (citing *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994)); *see also Reeves*, 530 U.S. at 141 (assuming without deciding that "the *McDonnell Douglas* framework is fully applicable" to ADEA claims).

Under the *McDonnell Douglas* burden-shifting framework, the plaintiff must first establish a *prima facie* case of age discrimination. *See, e.g., Hindman*, 145 F.3d at 990.

Generally, the plaintiff establishes this by producing evidence to show: (1) he or she is a member of a protected age group; (2) he or she was qualified for the position he [or she] held; (3) despite his or her qualifications, he or she was [terminated]; and (4) he or she was replaced by a younger

person. *Ziegler v. Beverly Enterprises-Minnesota*, 133 F.3d 671 at 675 (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 at 776). . . .

> Once the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Hutson*, 63 F.3d at 776-77. If the employer provides a non-discriminatory reason, the presumption of discrimination disappears, and the plaintiff can only avoid summary judgment if he or she presents evidence that considered in its entirety, (1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. *See Kneibert v. Thomson Newspapers*, 129 F.3d 444 at 452 (citing *Rothmeier v. Investment Advisers*, 85 F.3d 1328 at 1336-37). At all times, the plaintiff retains the burden of persuading the fact finder that intentional discrimination was the motivation for the adverse employment action. *Rothmeier*, 85 F.3d at 1337.

145 F.3d at 990-91 (footnotes omitted). A plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 530 U.S. at 148. The court assumes--as does FABG--that Blanchet has established or generated a genuine issue of material fact on elements one; three, and four of his *prima facie* case. Specifically, Blanchet was forty-seven years old at the time of his discharge, he was terminated, and FABG subsequently hired Burke, who was thirty years old at the time in question, as CFO.

FABG contends Blanchet has failed to generate a genuine issue of material fact on the second element of his *prima facie* case of age discrimination--namely, his qualification as CFO at FABG. FABG further argues that, in any event, even if Blanchet could establish a *prima facie* case, he has failed to raise a genuine issue of material fact regarding whether FABG's stated reason for his termination, his failure to properly perform his job duties, was pretextual. Additionally, FABG contends Blanchet has failed to generate a genuine issue of material fact as to whether his age was a motivating factor in FABG's decision to terminate him.

In support of its argument, FABG claims it gave Blanchet ample notice that his performance as CFO was sub-par and gave him abundant opportunity to improve upon his performance prior to his December 1998 termination. In fact, in a December 29, 1995 letter to Gibb and Kregel written by Blanchet, Blanchet admits that he "realize[s] that there are some functions that [he] [did not perform] as [FABG] would like [him] to do." Def. App. p. 19 (Doc. No. 19). The *Reeves* Court recognized that there are instances in which a plaintiff could "establish[] a prima facie case and set forth sufficient evidence to reject the defendant's explanation, [but in which] no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. The *Reeves* Court stated that summary judgment would be appropriate "if the record *conclusively revealed* some other, nondiscriminaotry reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted evidence* that no discrimination had occurred." *Id.* (emphasis added) Blanchet's admission that his performance could be improved upon does not make this case one of those instances hypothesized in *Reeves*. First, at the same time the letter admits imperfection, it also discusses Blanchet's

accomplishments and implies that those accomplishments had been discussed between the parties. Further, the letter is dated approximately three years prior to Blanchet's termination. Thus, the court concludes that the letter does not constitute concrete proof that would function to preclude any rational factfinder from finding for the plaintiff. *See Reeves*, 530 U.S. at 148. It is for the jury to decide what weight, if any, should be given to this letter. At this stage of the proceedings, the court's task is merely to determine whether there are any triable issues. *See Quick*, 90 F.3d at 1376-77.

FABG also contends that Kregel told Blanchet that he (Blanchet) would "not function as the CFO going forward" in October of 1997. Defendant Supp. App. p. 9 (Kregel Dep. pp. 41) (Doc. No. 40). Kregel claims FABG made this decision because the CFO position was, like the holding company, evolving, and it expanded beyond Blanchet's capabilities as a "numbers cruncher." FABG asserts that this evidence shows it was displeased with Blanchet's performance for an extended period of time and that Blanchet was aware of the company's dissatisfaction with his performance.

However, Blanchet denies having had this conversation with Kregel and reports that he did not learn of his termination until October 29, 1998. He claims that at the only point in time when he thought FABG might be dissatisfied, he was surprised by his satisfactory performance rating. Specifically, in October of 1997, Blanchet was given a raise of $1700; although significantly less than his prior raises from FABG, it was still a raise in salary. Two months later in December 1997, the results of his performance evaluation were satisfactory. Further, Blanchet claims that while he and Kregel were reviewing the evaluation, Kregel told Blanchet that his performance for the year was "fantastic." Plaintiff App. p. 18 (Ronald Blanchet Dep. p. 69, ll. 22-23) (Doc. No.

32). Kregel denies making this comment. Moreover, FABG attempts to explain the performance evaluation by making the dubious argument that it judged Blanchet's performance as CFO not on objective criteria, but rather on the basis of FABG's limited expectations of Blanchet in light of his finite capabilities.

FABG's principle support of its argument that Blanchet was indeed incompetent is its Chief Financial Officer Position Description. Defendant App. p. 16 (Doc. No. 19). In particular, FABG points to the first duty listed, which is to plan, develop, and maintain organizational-wide accounting systems, policies, and goals. While Blanchet admits he did not complete this task, he contends that he had begun it. However, as the sole employee in the holding company's accounting department, Blanchet asserts that he was overwhelmed with work. Moreover, he disputes that FABG ever informed him that the uniformity project was a top priority, and, therefore, he did not prioritize it among his varied duties. The record on this point is by no means clear with respect to Blanchet's progress in establishing a uniform system of accounting for all the separate banks of the holding company. In Burke's deposition, she stated that while she could not comment on Blanchet's participation in the project, which was ultimately completed after Blanchet's termination, she confirmed that the project was underway in 1997 and 1998--in other words, while Blanchet was CFO of FABG. Plaintiff App. p. 55 (Burke Deposition, p. 14, l. 22, p. 15, l. 4) (Doc. No. 32). In addition, Kregel himself confirms that Blanchet had attempted to implement a uniform accounting system, but that "he just never got the job done." Defendant Supp. App. p. 18 (Kregel Deposition, p. 85, l. 1) (Doc. No. 40). Because FABG relies so heavily on this project as one of its legitimate, nondiscriminatory reasons for Blanchet's termination, Blanchet's participation, success, and knowledge

of its importance to FABG, if any, are genuine issues of material fact that could have a significant bearing on the outcome of this litigation and, consequently, are questions for a trier of fact, not the court.

The only other evidence FABG offers in support of its contention that Blanchet was an incompetent CFO is a report compiled by McGladrey & Pullen, L.L.P.'s Management Development Institute ("MDI")[4] in October of 1996. After a background interview, psychological testing, and work simulation exercises, the MDI identified four "potential derailers" in Blanchet's management abilities. Specifically, the MDI noted: (1) problems with interpersonal skills; (2) low leadership profile; (3) difficulty with "big-picture" thinking that does not involve numbers; and (4) inflexibility. At the same time, the report identified four "key strengths": (1) loyalty; (2) high task orientation; (3) superb analytical skills; and (4) skillful troubleshooting abilities. While it is clear that Blanchet's assessment results are not exceptional, they certainly do not unequivocally illustrate Blanchet's complete ineptitude as a CFO. The report itself states that its objective is to "build a personal portfolio of the central problems, issues and opportunities in [Blanchet's] career." Defendant App. p. 26 (Doc. No. 19). Thus, it is intended to identify

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[4] McGladrey & Pullen, L.L.P. provides, among other services, an assessment of its clients' management through its Management Development Institute ("MDI"). According to its website, the MDI "addresses concerns about the competence, effectiveness and career potential of [its clients'] core management team." RSM McGladrey, Inc. Management Development Institute http://www.rsmmcgladrey.com/rsmmcgladrey_new.nsf/8f5aee734d115e9886256920006e9289/ec20fda OpenDocument (accessed Aug. 9, 2001) (hereinafter MDI Report).

both weaknesses and strengths so as to facilitate building upon strengths and improving upon weaknesses.

When viewed in the light most favorable to him as the non-moving party, as required by Rule 56, Blanchet's evidence sheds doubt on FABG's argument that by the end of Blanchet's tenure with FABG, it was clear to everyone that Blanchet was incompetent and was on his way out because of poor performance. Blanchet, therefore, has generated genuine issues of material fact concerning: (1) whether he was qualified for his position as CFO, thereby creating a question of fact on the only disputed element of his *prima facie* age discrimination case; and (2) whether his discharge was pretextual because FABG's satisfactory rating of Blanchet's performance does not comport with its claim that he was a failure as a CFO. The court agrees that, although the plaintiff's case is not the strongest case that this court has seen, Blanchet has generated genuine issues of material fact sufficient to survive a motion for summary judgment. Under *Reeves*, a trier of fact may infer unlawful discrimination if it finds an employer's articulated reasons for dismissing an employee are pretextual. *Reeves*, 530 U.S. at 148. This permissive finding of unlawful motivation, coupled with the *Crawford* standard of caution in employment discrimination cases, counsels against the court's granting of summary judgment in favor of FABG under the facts presented in this case. *See Crawford*, 37 F.3d at 1341 ("Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant."); *see also Snow*, 128 F.3d at 1205; *Webb v. Garelick Mfg. Co.*, 94 F.3d at 486; *Wooten*, 58 F.3d at 148; *Johnson*, 931 F.2d at 1244. This is not the kind of case hypothesized in *Reeves* in which "no rational factfinder could conclude that [FABG's] action was [age]

discriminatory." *See Reeves*, 530 U.S. at 148. First, the record does not "conclusively reveal some other, nondiscriminatory reason for the employer's decision." *See id.* Nor has Blanchet "created only a weak issue of fact as to whether the employer's reason was true[,] and there [is not] abundant and uncontroverted independent evidence that no discrimination had occurred." *See id.* Instead, Blanchet has generated genuine issues of material fact right at the heart of the question of whether FABG's reason for his termination was discriminatory by pointing to evidence that he had been performing his job adequately and that FABG's assertions to the contrary are untrue. Were the court the trier of fact, it would have difficulty concluding from the evidence presented that Blanchet's discharge was indeed motivated by discriminatory animus. Even though Blanchet has presented sufficient evidence to present a jury question as to whether FABG's proffered legitimate reasons were in fact the real reasons, any inference that FABG was "dissembling to cover up a discriminatory purpose" is weak. *See id.* at 147. Yet, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick*, 90 F.3d at 1376-77. As such, FABG's motion for summary judgment on Blanchet's age discrimination claim will be denied.

C. Sex Discrimination Claim

Blanchet asserts that FABG violated his state and federal rights by "discriminating against him because of his gender by terminating his employment." Pl.'s Cmplt., Causes of Action B and C, PP 27, 33. Specifically, he claims that his termination was in violation of Title VII and Chapter 216 of the Iowa Code. Both the state and federal sex discrimination claims are analyzed according to the *McDonnell Douglas*

burden-shifting paradigm. *See O'Sullivan v. Minnesota*, 191 F.3d 965, 969 (8th Cir. 1999) ("These claims [of gender discrimination] are governed by the familiar analytical framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668, (1973)."); *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act. Iowa courts therefore traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983)); *Board of Supervisors v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998) ("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework established in *McDonnell Douglas Corp. v. Green*) (citations omitted).

In *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999), the Eighth Circuit stated that a plaintiff's *prima facie* case of gender discrimination under Title VII consists of plaintiff showing the following: "(1) that [the plaintiff] is within the protected class; (2) that she [or he] was qualified to perform her [or his] job; (3) that she [or he] suffered an adverse employment action; and (4) that nonmembers of her [or his] class (persons . . . of the opposite gender in the Title VII sex discrimination context) were not treated the same." *Id.* "The fourth element in *Breeding*, however, necessarily implies that the nonmembers of the plaintiff's class who 'were not treated the same' were 'similarly situated,' or the *prima facie* case would not serve its purpose." *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1158 (N.D. Iowa 2000).

In addition, a *prima facie* case of gender discrimination when the plaintiff is male involves one further step, which is

referred to as a showing of "background circumstances."[5] *See*

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[5] Other courts have criticized the background circumstances test as imposing a higher standard of proof on a particular class of plaintiffs. *See, e.g.*, Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (rejecting background circumstances test because it imposes a higher burden on a class of plaintiffs); *Lucas v. Dole*, 835 F.2d 532 (4th Cir. 1987) (describing background circumstances test as imposing higher burden for reverse discrimination plaintiffs and, therefore, rejecting the test); *Ulrich v. Exxon Corp.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993) (describing background circumstances test as imposing a "heightened burden"); *Collins v. School Dist. of Kansas City*, 727 F. Supp. 1318, 1320 (W.D. Mo. 1990) (rejecting background circumstances test after concluding it imposes a higher *prima facie* burden).

Nonetheless, the following circuit courts of appeals have adopted the test: *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Duffy*, 123 F.3d at 1036-37; *Reynolds v. School District No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Notari v. Denver Water Dept.*, 971 F.2d 585 (10th Cir. 1995); *Parker v. Baltimore & O.R. Co.*, 209 U.S. App. D.C. 215, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *Murray v. Thistledown Racing Club*, Inc., 770 F.2d 63, 66-67 (6th Cir. 1985). United States district courts are routinely called upon to apply the test to reverse discrimination cases. *See, e.g., Ray v. Libbey Glass, Inc.*, 133 F. Supp. 2d 610, 620 (N.D. Ohio 2001) (describing showing of background circumstances sufficient to prove defendant is the unusual employer who discriminates against the majority as element of *prima facie* case of reverse discrimination); *DeWeese v. DaimlerChrysler Corp.*, 120 F. Supp. 2d 735, 747 (S.D. Ind. 2000) (same); *Olenick v. New York Telephone/A NYNEX Co.*, 881 F. Supp. 113, 114 (S.D.N.Y. 1995) (same); *Lemnitzer v. Philippine Airlines, Inc.*, 816 F. Supp. 1441, 1448 (N.D. Cal. 1992) (same), *aff'd in part, rev'd in part*, 52 F.3d 333 (9th Cir. 1995) (table op.).

Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998). The Eighth Circuit Court of Appeals recognized in *Duffy* that:

> In reverse discrimination cases, several courts have held that, to present a prima facie case, a plaintiff must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (quotations and citations omitted); *see also Bishopp v. District of Columbia*, 252 U.S. App. D.C. 156, 788 F.2d 781, 786 (D.C.Cir.1986) ("A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups to give rise to an inference of discriminatory motivation. White males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate

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Even courts that have adopted the test have subsequently called its continued validity into question. After adopting the test, the Sixth Circuit Court of Appeals later stated that it had "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n. 7 (6th Cir. 1994). The Sixth Circuit did not overrule its earlier adoption of the test, however, because the plaintiff in *Pierce* failed to meet his burden on other grounds. *See id.*

against them." (quotations, citations, and alterations omitted)).

123 F.3d at 1036. The Court of Appeals for the District of Columbia noted that what constitutes a showing of background circumstances can be divided into two general categories:

> (1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites [or other forbidden characteristics], *see Daye v. Harris*, 210 U.S. App. D.C. 145, 655 F.2d 258, 261 (D.C. Cir. 1981) (minority nurses over-represented among promotees); *Bishopp v. District of Columbia*, 252 U.S. App. D.C. 156, 788 F.2d 781, 786-87 (D.C. Cir. 1986) (among other factors, minority supervisors and proposed affirmative action plan); *Lanphear v. Prokop*, 227 U.S. App. D.C. 89, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (pressure on hiring authority to hire minorities and proposed affirmative action plan); and (2) evidence indicating that there is something "fishy" about the facts of the case at hand that raises an inference of discrimination. *See Daye*, 655 F.2d at 260-61 (plaintiff alleged "scheme" to fix performance ratings); *Lanphear*, 703 F.2d at 1315 (plaintiff was given "little or no consideration" for the promotion, and supervisor never fully reviewed qualifications of minority promotee); *Bishopp*, 788 F.2d at 786-87 (promotee was less qualified than four white plaintiffs and was promoted "over their heads ... in an unprecedented fashion"). . . . "Background circumstances" need not mean "some circumstance in the employer's background." On the contrary, other evidence about the "background" of the case at hand--

> including an allegation of superior qualifications--can be equally valuable.

Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993).

FABG asserts it is doubtful that Blanchet can generate a *prima facie* case of sex discrimination, especially under the arguably heightened standard of proof required under *Duffy*. The Second Circuit Court of Appeals, however, has characterized the evidence necessary to support a plaintiff's *prima facie* case in general as "minimal" and "de minimis." *Zimmermann v. Associates First Capital Corp.* 251 F.3d 376, 381 (2d Cir. 2001) (citing *Byrnie v. Town of Cromwell*, 243 F.3d 93, 101) (2d Cir. 2001); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001)). It further held that "the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage of the Title VII analysis." *Id.* (citing *Tarshis v. Riese Org.*, 211 F.3d 30, 36 (2d Cir. 2000); *Cook v. Arrowsmith Shelpburne, Inc.*, 69 F.3d 1235, 1239 (2d Cir. 1995)). The United States Supreme Court, too, acknowledged that "the burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dept. of Cmmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *see also Hindman*, 145 F.3d at 991 (same).

Indeed in *Duffy*, the case in which the Eighth Circuit adopted the background circumstances test, the court held that the plaintiff had offered sufficient proof of background circumstances to survive a motion for summary judgment. *See Duffy*, 123 F.3d at 1037. In *Duffy*, the male plaintiff filed a *Bivens* action to challenge the decision of a panel comprised of United States District Court Judges for the Southern District of Iowa to appoint a female applicant rather than the

male plaintiff to the Chief United States Probation Officer position. The background circumstances which the circuit court held were sufficient to make a *prima facie* case of employment discrimination included allegations that the female applicant was substantially less qualified for the position than the plaintiff, that one member of the panel had mentioned an interest by someone in the Administrative Office in recruiting a woman, and that two members of the panel usually hired female law clerks. *Id.* Although not couched in terms of background circumstances, the evidence that Blanchet offers "[to] support the suspicion that [FABG] is that unusual employer who discriminates against the majority" is three-fold: First, he contends that FABG had an incentive to promote women in order to have greater gender balance with respect to the company's highest paid employees; second, he asserts that the Talent Scout program illustrates a general attitude within FABG of preferring women over men; and third, he intimates that his replacement, Burke, was less qualified to perform the position of CFO than he was. The court turns to a review of the facts alleged to support Blanchet's arguments.

Blanchet asserts Kregel told the plaintiff that Stark requested a list of the top paid employees at FABG. According to Blanchet, Kregel also stated that Stark was extremely upset by the fact that only one woman, Lois Pannkuk, was on the list. Plaintiff App. 9 (Blanchet Deposition p. 32, ll. 9-16) (Doc. No. 32). Blanchet argues that this, when coupled with Burke's ten-thousand dollar raise for 1998, evidences an intent by FABG to promote women into management in order to equalize upper-management salaries between men and women. The Talent Scout program is the second background circumstance Blanchet alleges. According to FABG's current President and CEO, Thomas Schnurr, the Talent Scout program was initiated in 1998 to

"identify lower level employees (particularly females) who could be considered for additional training and advancement and . . . to survey all employees as to their career plans, as to their strengths and abilities, to identify areas where they would like to improve their skills, and to identify candidates for promotion." Defendant App. 10 (Aff. of Thomas G. Schnurr, at p. 3) (Doc. No. 19). While FABG has not admitted in its depositions and affidavits that the program was designed solely, as opposed to "particularly," for women, Kregel admits that no men were considered for the program. Defendant Supp. App. 14 (Deposition Tom Kregel, p. 61, l. 20) (Doc. No. 40). However, he explained that this was because the program was designed for non-officers and that there were very few male non-officers. Defendant Supp. App. 14 (Deposition Tom Kregel, p. 61, l. 25) (Doc. No. 40). In addition, Blanchet contends that, in response to a question raised by Kregel at a meeting attended by Pannkuk, Kregel, Blanchet, and Burke, Pannkuk, the administrator of the Talent Scout program, stated: "Tom, you knew this program was only for women." Plaintiff App. 14 (Blanchet Deposition, p. 50, ll. 15-16). While Blanchet was not personally harmed by this program because Burke, his replacement, was (1) not a lower level employee targeted by the Scout Program, and (2) was already employed by FABG as Assistant Vice President before the program was initiated, the program demonstrates background circumstances sufficient to support Blanchet's *prima facie case* of discrimination.

The last background circumstance Blanchet alleges is that Burke was less qualified to serve as CFO. He asserts this fact raises an inference of discriminatory animus. The D.C. Circuit explained this inference, stating:

> A rational employer can be expected to promote the more qualified applicant over the less qualified,

> because it is in the employer's best interest to do so. And when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the employer acted out of a discriminatory motive.

Harding, 9 F.3d at 153-54. In support of this argument, however, Blanchet offers little more than bare assertions that, while working under Blanchet in 1997 and 1998, Burke's performance was mediocre. Both Burke and Blanchet are equally educated; both hold bachelor's of arts degrees, and both are Certified Public Accountants.

FABG disputes Blanchet's assertions that Burke was less qualified and further contends that Blanchet's *prima facie* case of gender discrimination fails on this point because he and Burke were not "similarly situated." According to FABG, Burke was substantially more qualified, pointing to Burke's positive MDI assessment, the fact FABG no longer contracts out accounting work to Schnurr & Co., and Burke's accomplishments as CFO, including successfully completing tasks and projects it argues Blanchet was unable to complete. Both parties also presented evidence that the essential functions of the CFO position have changed since Blanchet's termination, such as a greater number of employees in the accounting division and a single bank charter instead of individual charters among the several banks. While FABG asserts this is because Burke has greater "vision" and is better equipped to meet the demands of the position, Blanchet suggests the changes occurred in order to accommodate Burke's lesser capabilities. Nevertheless, while it is true bare assertions of superior qualifications create no genuine issues of fact and will not withstand summary judgment, in order to be "similarly situated," Blanchet and Burke need only be equally qualified. *See Celotex Corp. v. Catrett*, 477 U.S.

317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court concludes that Blanchet has established or created a genuine issue of material fact on his *prima facie* case of gender discrimination, and, like his age discrimination claims, Blanchet's case, although weak, suffices to survive FABG's motion for summary judgment. *See Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) (finding plaintiff's allegation that he was better qualified than minority candidate chosen ahead of him for promotion could constitute sufficient background circumstances to establish a *prima facie* case of reverse discrimination). *But see Nelson v. City of Flint*, 136 F. Supp. 2d 703, 716 (E.D. Mich. 2001) (holding affirmative action plan insufficient to establish background circumstances). Blanchet has created a genuine issue of material fact on the element of his qualifications, and his further assertions that he possesses superior qualifications, coupled with the stated purpose of the Talent Scout program, serve to generate a factual question regarding the existence of background circumstances necessary to support a claim of reverse sex discrimination.

FABG contends that, in light of the modest evidentiary standard that attends a *prima facie* showing, *see Burdine*, 450 U.S. at 253, 101 S. Ct. at 1094; *see also Hindman*, 145 F.3d at 991, if Blanchet can establish a *prima facie* case, FABG has articulated a legitimate, non-discriminatory reason for discharging him and that Blanchet has failed to come forward with any evidence to prove that defendant's proffered reason is pretextual or with any evidence that his termination actually resulted from discriminatory animus. Consequently, FABG asserts that Blanchet has not carried his burden under the *McDonnell Douglas* burden-shifting paradigm. As a male, Blanchet is protected under state and federal law (element one); there is a genuine issue of material fact as to whether Blanchet was qualified to perform his job as discussed earlier

in this opinion (element two); he was terminated (element three); there is a genuine issue of material fact as to whether he and Burke were "similarly situated" (element four); and, as discussed above, he has set forth three background circumstances to support the suspicion that FABG is "that unusual employer who discriminates against the majority" (element five). *Duffy*, 123 F.3d at 1036 (citing *Murray*, 770 F.2d at 67; *Bishopp*, 788 F.2d at 786). As such, the burden shifts to FABG to articulate a legitimate, nondiscriminatory reason for Blanchet's termination, which it did by asserting Blanchet was incompetent and the company needed a CFO with more vision and greater leadership abilities. For the reasons set forth in Section II.B, the court reasserts that Blanchet has brought forth sufficient evidence, attenuated though it may be, to question the veracity of FABG's stated reasons, which may give rise to an inference of intentional discrimination. *See Reeves*, 530 U.S. at 148. In light of the *Crawford* standard of caution in employment discrimination cases, the court again finds that Blanchet has generated genuine issues of material fact, the weight and truth of which can only be determined by a trier of fact. *See Crawford*, 37 F.3d at 1341.

D. Public Policy Claim

Next, the court turns to FABG's contention that it is entitled to summary judgment on Blanchet's remaining claim of wrongful discharge in violation of public policy, which, as explained above, is a claim that Blanchet was discharged for refusing to participate in an allegedly fraudulent insurance scheme. FABG contends that there is no evidence that the decision to end Blanchet's tenure with the company was in retaliation for his refusal to assist in filing disability claims on behalf of former CEO, Gibb. FABG further asserts that Blanchet was terminated because he was not fulfilling the role

FABG envisioned of the CFO position and, in addition, that FABG merely asked Blanchet whether Gibb had asked him (Blanchet) to file a disability claim, acting on information that this request indeed had been made. FABG denies any fraudulent intent behind this question.

Blanchet argues otherwise and contends that he has established, or has generated a genuine issue of material fact as to, a causal connection between his refusal to state that Gibb had asked him to file a claim and his discharge by showing a chain of events linking the insurance conversation to his ultimate discharge, approximately one year and eight months later. Blanchet argues that the chain consists of several links. Namely, a couple of months after the initial conversation in April of 1997, Blanchet asserts that in a meeting attended by Blanchet, Kregel, and Schnurr in which the disability claims were discussed, Kregel told Blanchet that he was "too honest" and that his standards were "too high." Plaintiff App. 17 (Blanchet Dep. p. 65, ll. 3-7) (Doc. No. 32). And second, Blanchet contends that his $1700 raise, even though his performance evaluation was satisfactory, was an attempt by FABG to punish him for his lack of cooperation with the insurance claims. Plaintiff App. 18 (Blanchet Dep. p. 66, ll. 8-17) (Doc. No. 32). Blanchet received this raise in October of 1997, six months after the conversation concerning the insurance claims. And finally, because the decision to terminate Blanchet was made, according to Kregel, two to three months prior to July of 1997, even though twenty months had passed between the conversation and Blanchet's termination, only one to three months had passed before FABG made the decision to discharge the plaintiff. Defendant Supp. App. 9 (Kregel Dep. p. 44, ll. 19-24).

As noted above, the Iowa Supreme Court has explained that a common-law claim of retaliation is also subject to a

burden-shifting analysis: The plaintiff must establish a *prima facie* case of retaliatory discharge by showing "(1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge." *Fitzgerald v. Salsbury Chem.*, Inc., 613 N.W.2d 275, 281 (Iowa 2000) (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998)); *see, e.g., City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996); *Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995); *Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989) (*Hulme I*). The court agrees with Blanchet that there are genuine issues of material fact at each stage of this analysis.

Iowa law recognizes a common-law exception to the general rule of at-will employment when an employee's discharge is in clear violation of a well-established and well-defined public policy. *See, e.g., Fitzgerald*, 613 N.W.2d at 281 (outlining history of at-will employment doctrine and exceptions recognized in Iowa) (citing *French v. Foods, Inc.*, 495 N.W.2d 768, 769-71 (Iowa 1993) (employee handbook may create unilateral contract); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988) (narrow public policy exception adopted); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 455 (Iowa 1978) (first recognizing the possibility of public policy exception)). FABG disagrees with Blanchet's assertion that he was engaged in protected activity. Instead, it contends that it merely asked Blanchet whether he had been instructed to file a disability claim and that Iowa law does not recognize a public policy against questioning employees whether duties had been assigned to them and whether they had been performed. It cites *French v. Foods, Inc.*, 495 N.W.2d 768 (Iowa 1993), in support of this proposition, which the court finds puzzling because the public policy issues in the *French* case dealt with claims of being presumed innocent until proven guilty. While the case did

involve the defendant's use of a private investigator's questioning of employees regarding violation of store policy, the Iowa Supreme Court held only that while the defendant's "tactics in obtaining [plaintiff's] written statement were high-handed and coercive, this case does not involve perjury or a criminal charge of dishonesty. Nor does it involve the presumption of innocence." *Id.* at 772. Nevertheless, FABG's assertion that questioning employees about duties is not in violation of Iowa public policy is presumably true, especially in light of the Iowa Supreme Court's recognition of "the employer's interest in operating its business in the manner it sees fit." *Fitzgerald*, 613 N.W.2d at 282 (citing 2 Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 7.10 at 19 (4th ed. 1998)).

However, whether Kregel merely questioned Blanchet about a particular duty or intended Blanchet to read between the lines is at the heart of this lawsuit. Blanchet claims that, while the words Kregel used did not, on their face, request illegal or fraudulent conduct, Kregel approached Blanchet with a nod and a wink, and that Blanchet knew immediately that he had been requested to provide false information in order to recover under Gibb's insurance policies. "In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, [Iowa courts] have primarily looked to statutes but have also indicated [the Iowa] Constitution to be an additional source." *Id.* at 283 (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994)). Under the Iowa Insurance Fraud Act:

A person commits a class "D" felony if the person, with the intent to defraud an insurer, does any of the following:

a. Presents or causes to be presented to an insurer, any written document or oral statement, including a

> computer-generated document, as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.
>
> *b.* Assists, abets, solicits, or conspires with another to present or cause to be presented to an insurer, any written document or oral statement, including a computer-generated document, that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.
>
> *c.* Presents or causes to be presented to an insurer, any written document or oral statement, including a computer-generated document, as part of, or in, an application for insurance coverage, knowing that such document or statement contains false information concerning a material fact.

Iowa Code § 507E.3(2) (a-c). In order to explain the delay between Gibb's death and the filing of his disability claims, Blanchet asserts that Kregel asked him to sign an affidavit that stated Gibb asked Blanchet prior to Gibb's death to begin processing Gibb's claims. Because it is unlawful under Iowa law to file a fraudulent insurance claim or to assist in such a filing, if Blanchet indeed were asked to lie and, consequently, violate Iowa law, he would likely be protected by Iowa public policy. *See id.; see also Jones v. Lake Park Care Ctr.*, 569 N.W.2d 369, 377 (Iowa 1997) ("Terminating an employee for refusal to do an illegal act is a violation of public policy."); *Smuck v. National Management Corp.*, 540 N.W.2d 669, 673

(Iowa Ct. App. 1995) ("We believe it is contrary to public policy to fire an employee for refusing to break any law, be it state or federal."). Furthermore, "the public policy of this state . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury." 613 N.W.2d at 286. Blanchet's assertion that he was asked to sign an affidavit containing false information is sufficiently analogous to committing perjury that this court is of the opinion that a dismissal for any such refusal would be a violation of Iowa public policy.

The next element of Blanchet's *prima facie* case of retaliatory discharge is undisputed: He was terminated. However, a plaintiff who alleges retaliatory discharge in violation of public policy must not only have engaged in protected conduct and have been terminated; his discharge must jeopardize the public policy in question. *Fitzgerald*, 613 N.W.2d at 284 (citing *Yockey*, 540 N.W.2d at 421) (public policy favoring workers' compensation claim not frustrated if employer terminated employee for missing work due to the work-related injury). "The conduct of the employee must be tied to the public policy, so that the dismissal will undermine the public policy. . . ." *Id.* (citing *French*, 495 N.W.2d at 771-72) (public policy against suborning perjury not implicated if employer terminates the employee after using coercive and high-handed tactics to obtain confession). In other words, "this element requires the employee to show the conduct engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct." *See id.* (citing *Teachout*, 584 N.W.2d at 303, which held public policy to report suspected child abuse implicated when employee is terminated for good faith intent to report child abuse; and *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994), which held discharge for conduct that conforms to public policy would create a chilling

effect on public policy by indirectly forcing employees to forego the conduct; and *Smith v. Smithway Motor Xpress*, Inc., 464 N.W.2d 682, 684-85 (Iowa 1990), which held public policy for employees to file workers' compensation claim implicated when employee is terminated after receipt of workers' compensation benefits; and *Niblo v. Parr Mfg.*, 445 N.W.2d 351, 353 (Iowa 1989), which held public policy for employees to file workers' compensation claim is implicated when employee is terminated for threatening to file claim).

Blanchet's allegations on this point are analogous to the fact situation in *Fitzgerald*. In *Fitzgerald*, the plaintiff (Fitzgerald) was terminated after he expressed support for a former employee (Koresh) who had been terminated after testifying in a third former employee's wrongful death lawsuit. 613 N.W. 2d at 287. Fitzgerald's employer warned him that Koresh's discharge might result in litigation and that Fitzgerald must decide which side he would support. *Id.* The employer in *Fitzgerald* argued that Fitzgerald's termination did not jeopardize public policy because the employer never requested that Fitzgerald commit perjury. *Id.* at 288. The employer asserted that absent an explicit request to violate public policy, Fitzgerald's discharge could not possibly undermine any public policy. *Id.* The court rejected this contention and held:

> Dismissal of an employee can jeopardize public policy when the employee has engaged in conduct consistent with the public policy without a request by the employer to violate public policy just as it can when the employee refuses to engage in conduct which is inconsistent with public policy when requested by the employer.

Id.

Here, too, FABG asserts that it did not request Blanchet to lie; Kregel merely asked Blanchet, according to FABG, a simple yes or no question. Yet, the Iowa Supreme Court clearly held that an explicit request to violate public policy is not necessary. *See id.* Thus, even if FABG did not expressly request Blanchet to participate in an insurance fraud scheme, if the trier of fact determines that was FABG's intent, it could also find that Blanchet's termination jeopardized public policy.

The third element of a plaintiff's *prima facie* case requires plaintiff show causation between the protected conduct alleged and the adverse employment action. "The causation standard in a common-law retaliatory discharge case is high." *Teachout*, 584 N.W.2d at 301 (citing *Hulme*, 480 N.W.2d 40 at 42) (discussing statutory retaliatory discharge claim). The Iowa Supreme Court has held that "engagement in the protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee." 584 N.W. 2d at 301-02 (citing *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990); *Graves v. O'Hara*, 576 N.W.2d 625, 628 (Iowa Ct. App. 1998)). "A factor is determinative if it is the reason that 'tips the scales decisively one way or the other,' even if it is not the predominant reason behind the employer's decision." 584 N.W. 2d at 302 (citing *Smith*, 464 N.W.2d at 686).

In Blanchet's deposition, opposing counsel questioned Blanchet on this point. Namely, FABG's counsel asked Blanchet, "Now do I understand the allegations in your petition that you believe that you were terminated because of this conversation that you initially had with Tom Kregel in April of 1997 concerning the disability insurance coverage?" Def.'s App. p. 96 (Blanchet Dep. p. 66, ll. 4-7). Blanchet responded, "I believe that's the start of my demise at First

American Bank Group." Def.'s App. p. 96 (Blanchet Dep. p. 66, ll. 8-9). FABG argues that this testimony constitutes an admission that Blanchet's refusal to sign an allegedly fraudulent document was not the determinative factor in his dismissal and, therefore, is an acknowledgment that he failed to establish a *prima facie* case. However, the Iowa Supreme Court cautioned that "the protected conduct must be the determining factor, but not the predominant factor." *Teachout*, 584 N.W.2d at 302 n. 2, *overruling Butts v. University of Osteopathic Med. & Health Sciences*, 561 N.W.2d 838, 842 (Iowa Ct. App. 1997). Blanchet, for his part, denies that this testimony is inconsistent with the causation element of his *prima facie* case, because he contends that his discharge in violation of public policy claim consists of more than the single conversation between Blanchet and Kregel. Instead, he argues that the conversation was the first in a chain of events surrounding the Gibb insurance claim that lead to his dismissal. Furthermore, while FABG contends that the extraordinary time interval between the insurance conversation in April of 1997 and Blanchet's discharge in December of 1998 is too great a delay as a matter of law to create an inference of causation, Blanchet asserts that these other events that occurred in the meantime functioned to prevent the inference from growing stale.

Evidence that an adverse employment action occurred after an employee engaged in protected conduct can be circumstantial evidence of an employer's retaliatory motive. *See Weinzetl v. Ruan Single Source Transp. Co.*, 587 N.W.2d 809, 811 (Iowa Ct. App. 1998) (recognizing harassment after employee filed workers' compensation claim was circumstantial evidence of retaliatory motive) (citing *Clarey v. K-Products Inc.*, 514 N.W.2d 900, 902 (Iowa 1994)). The Eighth Circuit Court of Appeals has held that the causal connection between allegedly retaliatory action by the

employer and protected activity by the employee can be established by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (stating this rule in a case involving retaliation under the Energy Reorganization Act (ERA)); *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 456 (8th Cir. 1995) (stating this rule in an ERISA retaliation case); *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993) (stating this rule in a case in which a discharge followed a report to OSHA by only four days); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992) (stating this rule, but expressing doubt that a discharge six months after alleged whistle-blowing met the causal connection requirement); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (a discharge thirty days after protected activity involved sufficient temporal proximity to establish the necessary causal connection); *Keys v. Lutheran Family & Children's Servs. of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981) (a discharge less than two months after protected activity had sufficient proximity to establish the necessary causal connection).

Although the Iowa Supreme Court has stated that "the mere fact that an adverse employment decision occurs after [protected activity] is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim," *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992) (*Hulme II*), the inference arising from such temporal proximity may be sufficient to preclude summary judgment, particularly where temporal proximity is coupled with other evidence giving rise to an inference of illegal motive. *See Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 712 (Iowa 1995) (holding that the trial court erred in granting summary judgment on a retaliatory

discharge claim, because, although the issue would "no doubt be hotly disputed during a full trial," there was a genuine issue of material fact as to causal connection where the employee's termination followed on the heels of her discrimination complaint and she had never been disciplined for any of the reasons the employer gave for firing her).

The conversation between Kregel and Blanchet in which Blanchet claims Kregel implied that he wanted Blanchet to lie in order to recover under Gibb's disability policies occurred in April of 1997. Blanchet alleges that he learned of his dismissal sometime in October of 1998 and was ultimately terminated on December 31, 1998. In light of case law, this considerable delay is a significant hurdle for the plaintiff. As the cases cited above illustrate, eighteen months is an extraordinary and unprecedented amount of time on which to base an inference of causation. In *Fitzgerald*, for instance, the plaintiff was discharged only a few hours after the conversation with his supervisor in which the plaintiff was impliedly instructed to commit perjury and told to "start thinking like a foreman" and to "figure out which side he was on." *Fitzgerald*, 613 N.W.2d at 279. In *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 203 (Iowa 1997), the plaintiff was discharged one month after making an inquiry under the Iowa Wage Payment Collection Law, which he asserted was the reason behind his termination. The Iowa Supreme Court, however, held that because there was no evidence to support the plaintiff's retaliation claim other than the fact that the termination followed the filing of the grievance, summary judgment was appropriate. *Id.*

Furthermore, "the existence of other legal reasons or motives for the termination are relevant in considering causation." *Fitzgerald*, 613 N.W.2d at 288. An employer is not forbidden from discharging an employee for inadequate

performance. *Cf. Hulme II*, 480 N.W.2d 40 at 43 ("The protection afforded by anti-retaliatory legislation [here, the Iowa Civil Rights Act] does not immunize the complainant from discharge for past or present inadequacies, unsatisfactory performance, or insubordination.") (citing *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988)). The court has discussed in detail FABG's stated reasons for dismissing Blanchet, and further recitation is unnecessary. It suffices to say that if FABG's articulated justification were accepted as true and legitimate, causation would more than likely be lacking. However, "generally, causation presents a question of fact. Thus, if there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute." *Fitzgerald*, 613 N.W.2d at 289 (citing Perritt, *supra*, § 7.21, at 54). Because different inferences can be drawn from the evidence presented by Blanchet and FABG, summary judgment would be inappropriate in this case.

Based on the evidence produced, were the court the trier of fact, it would not find for the plaintiff. However, the court is not the trier of fact, and its role is "not to weigh the evidence . . ., decide credibility questions, or determine the truth of any factual issue; instead, [the court] perform[s] only a gatekeeper function of determining whether there is evidence in the summary judgment record generating a genuine issue of material fact for trial on each essential element of a claim." *Kampouris v. St. Louis Symphony*, 210 F.3d 845, 847 (8th Cir. 2000) (Bennett, J., dissenting) (citing *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999); *Do v. Wal-Mart Stores*, 162 F.3d 1010, 1012 (8th Cir.1998); *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir.1998); *Bryan v. Norfolk & Western Ry. Co.*, 154 F.3d 899, 902 (8th Cir.1998), *cert. dismissed*, 525 U.S. 1119, 119 S. Ct. 921,

142 L. Ed. 2d 899 (1999); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir.1996)). Moreover, "the right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942); *see also Kampouris*, 210 F.3d at 849. While Blanchet's evidence is weak, he raises sufficiently genuine issues of material fact that should ultimately be determined by his peers. In light of the court's role in this stage of the proceedings and in light of the evidence produced, the court would be failing to "jealously guard" Blanchet's Seventh Amendment right to a trial were it to grant FABG's motion for summary judgment.

IV. CONCLUSION

The court concludes that genuine issues of material fact preclude summary judgment on Blanchet's age and sex discrimination claims. The court also finds that Blanchet has generated genuine issues of material fact on his retaliatory discharge in violation of Iowa public policy claim. Therefore, FABG's motion for summary judgment is **denied** in its entirety.

IT IS SO ORDERED.

DATED this 31st day of August, 2001.

MARK W. BENNETT
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX E

Uniform
Accountancy Act and
Uniform
Accountancy Act Rules

Third Edition, Revised November, 2002

Standards for Regulation Including Substantial Equivalency

Published jointly by the
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ARTICLE 14 UNLAWFUL ACTS

Rule 14-1 - Misleading CPA firm names.

A CPA firm name is misleading within the meaning of Section 14(i) of the Act if, among other things:

(a) The CPA firm name implies the existence of a corporation when the firm is not a corporation;

(b) The CPA firm name implies existence of a partnership when there is not a partnership (as in "Smith & Jones, C.P.A.s");

(c) The CPA firm name includes the name of a person who is neither a present nor a past partner, member or shareholder of the firm; or

(d) The CPA firm name includes the name of a person who is not a CPA if the title "CPAs" is included in the firm name.

Rule 14-2 - Fictitious firm names.

A fictitious CPA firm name (that is, one not consisting of the names or initials of one or more present or former partners, members or shareholders) may not be used by a CPA firm unless such name has been registered with and approved by the Board as not being false or misleading.

Rule 14-3 - Safe harbor language.

Non-licensees may use the following disclaimer language in connection with financial statements to not be in violation of the Act:

> "I (we) have prepared the accompanying (financial statements) of (name of entity) as of (time period) for the (period) then ended. This presentation is limited to preparing in the form of financial statements information that is the representation of management (owners).
>
> I (we) have not audited or reviewed the accompanying financial statements and accordingly do not express an opinion or any other form of assurance on them.

APPENDIX F

RSM Salustro Reydel, KPMG to merge

Published: November 2004
Source: International Accounting Bulletin

The French Ministry of Finance has effectively given the go-ahead for a merger between RSM Salustro Reydel and KPMG, concluding that a Joining of forces between the two firms would not be detrimental to competition in the national market.

The French Ministry of Finance has effectively given the go-ahead for a merger between RSM Salustro Reydel and KPMG, concluding that a joining of forces between the two firms would not be detrimental to competition in the national market.

A spokesperson for KPHG told IIAB: "Now that we have this reply, It means that we are going to finalise the project. Our aim is to make this definitely happen by the end of March next year."

Both firms believe the move will strengthen their positions in the French market. A spokesperson for RSH Salustro Reydel said: "The merger with KPIG gives us access to an International network that is much stronger and wider, notably in Asia, than what RSH International provides us with. So, as a result, we are leaving RSH International. Our firm will be known as Salustro Reydel from the beginning of January."

The spokesperson for RSH Salustro Reydel explained that the merger is also "taking place to mobilise more resources with expertise on subjects like IFRS, which we need at the moment." It was felt that "the firm's strategy has not been to move into the middle-market, but to stay with larger clients in the SBF 120 [stock index]. We have few clients in common with KPMG, and no audit clients in common - there is not much overlap."

This distinction of client base has grown in importance during the past 12 months after the introduction of the *loi sur la sécurité financiére* (LSF), which reinforces the traditionally strong divide in France between audit and non-audit services.

The latest *IAB* survey of France shows that, potentially, the combined revenues of both firms will be approximately €750 million, making it the firm with the highest fee income in the country.

RSH International has told *IAB* it intends to create a new firm to be known as RSH France. The firm will start with 300 people and have offices in Paris, Strasbourg, Lyon, Rouen and Nantes. Its turnover will be €45 million. Registration as Statutory Auditors is expected in January 2005, and the firm fully expects to see significant demand form mid-to-large listed clients for its range of non-audit services. In a statement, the firm also said that "the national coverage in France provided new options to French mid-market companies looking for International services."

David Maxwell, RSM's European partner, said: "What we're putting together Is very exciting for the French market."

APPENDIX G

RSM Robson Rhodes LLP
2004 Annual Review

[pg. 55]

Legal from of RSM International

RSM International is an Association formed by the founding firms and based in Switzerland. The Association owns the right to the name RSM International and controls and licenses the use of the name, trademarks and intellectual property. RSM International Limited, a company limited by guarantee and registered in England, manages the affairs of RSM International. Firms which meet the quality and service standards approved by the Board of Directors are admitted to membership. Admission to membership is approved only after an independent inspection shows that standards are met. There is a regular programme of inter-firm inspection to ensure standards are being maintained. RSM International is a network of independent member firms which practice in their own right.

The founding firms are:

RSM Bird Cameron
Australia

RSM Haarmann Hemmelrath GmbH
Germany

RSM McGladrey
United States

RSM Robson Rhodes
United Kingdom

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 04-17602-BKC-AJC
Adv. No. 06-01381-BKC-AJC-A

[Filed June 21, 2006]

In re:	)
	)
E.S. BANKEST, L.C.,	)
	)
Debtor.	)
	)
LEWIS B. FREEMAN, as Liquidating Trustee for the E.S. BANKEST, L.C. Liquidating Trust	)
	)
vs.	)
	)
Plaintiff,	)
	)
McGLADREY & PULLEN, LLP and RSM McGLADREY, INC.,	)
	)
Defendant.	)
	)

RSM McGLADREY, INC.,'S MOTION TO DISMISS LIQUIDATING TRUSTEE'S COMPLAINT WITH PREJUDICE

RSM McGladrey, Inc., by and through its undersigned counsel and pursuant to Fed. R. Bankr. P. 7012, files its Motion to Dismiss Liquidating Trustee's Complaint with Prejudice. In support of its Motion, RSM McGladrey, Inc. states as follows:

1. On April 14, 2006, Lewis B. Freeman, as Liquidating Trustee for the E.S. Bankest, L.C. Liquidating Trust (the "Liquidating Trustee"), filed the instant adversary proceeding against McGladrey & Pullen, LLP ("M&P") and RSM McGladrey, Inc. ("RSM").

2. The Liquidating Trustee's claims arise out of services performed by M&P for its audit client, Stratesec, Inc. ("Stratesec"), and from M&P's subsequent resignation as Stratesec's audit firm.

3. The complaint alleges that M&P resigned as Stratesec's auditor because of a disagreement with Stratesec over proper accounting treatment of Stratesec's acquisition of Security Systems Integration ("SSI").

4. The crux of the Liquidating Trustee's convoluted complaint is that M&P somehow owed a duty to E.S. Bankest, L.C. (the "Debtor") to "disclose fully the circumstances of the resignation and the source of its disagreement with the client." (Compl. at ¶ 3). The Liquidating Trustee's complaint attempts to assert claims for, among other things, alleged violations of federal securities law and professional malpractice.

5. With respect to RSM, the Liquidating Trustee has simply named the wrong party. RSM **was not** Stratesec's auditor. It did not render the audit services or issue the statements that form the basis of the Liquidating Trustee's claims.

6. M&P and RSM are separate and independent legal entities. M&P is a CPA firm which provides auditing services to midsized companies. RSM is a professional services firm that provides consulting and tax services.

7. In fact, the Liquidating Trustee acknowledges in his complaint that M&P and RSM are two distinct legal entities. (Compl. at ¶¶ 9-10).

8. Without any rationale basis for doing so, the Liquidating Trustee has simply defined these two entities throughout his complaint as "McGladrey," and attempts to treat them as if they were a single entity.

9. However, a review of the Liquidating Trustee's complaint clearly reveals that every single allegation of wrongdoing relates solely to M&P's services and statements. As discussed previously, RSM **does not** provide audit services and RSM **never provided** audit services to Stratesec. RSM should not have been named as a defendant in this action in the first instance.

10. While the Court's review of a motion to dismiss is ordinarily confined to the four-corners of the complaint, the law in this Circuit is clear that the Court can take judicial notice of the relevant SEC filings that form the basis of the Liquidating Trustee's complaint. *See Bryant v. Avado Brands, Inc,*, 187 F.3d 1271, 1276 (11th Cir. 1999).

11. Notably, RSM is not even mentioned in any of the SEC filings referenced in the Liquidating Trustee's complaint. For example, in paragraph 31 of the complaint, the Liquidating Trustee quotes from a Form 8-K dated February 15, 2001, stating that:

> there were no disagreements with [the auditor] on any matter of accounting principals or practices, financial statement disclosure, audit scope or procedure...**McGladrey & Pullen, LLP** had not formed a conclusion about whether the Company's accounting for the acquisition of SSI meets the conditions for pooling-of-interests method of accounting.

(Compl. at ¶ 31) (emphasis added).

12. Moreover, Stratesec's Form 8-K filed on December 1, 2000, discusses the **appointment of M&P** as its independent auditors. *See* Stratesec, Inc., 8-K (Dec. 1, 2000). Similarly, Stratesec's February 15th 8-K reports the **resignation of M&P** as its auditors. *See* Stratesec, Inc., 8-K (Feb. 15, 2000). Copies of the aforementioned Form 8-K's are incorporated herein and attached hereto as **EXHIBIT A**.

13. Simply put, nothing in the Form 8-K's could possibly implicate RSM in any way. To the contrary, they demonstrate that the audit services which form the basis for the Liquidating Trustee's claims were performed by M&P, a separate and distinct legal entity.

14. Pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b)(6), a defendant's motion to dismiss a complaint should be granted when the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994); *Wood v. IRS(In re Wood)*, 328 B.R. 880, 887 (Bankr. S.D. Fla. 2005).

15. As the success of the Liquidating Trustee's complaint rises and falls on the alleged action or inaction of Stratesec's independent auditors, and the record is clear that it was M&P, not RSM that provided such services, the Liquidating Trustee cannot propose a set of facts which would provide a basis for relief against RSM. Accordingly, the Court should dismiss the complaint with prejudice as against RSM.

16. The Liquidating Trustee's claims against RSM should be alternatively dismissed on the following grounds: (a) the Liquidating Trustee's federal securities claims are time-barred; (b) the Liquidating Trustee's fraud claims fail to satisfy the rigorous pleading requirements of the PSLRA and Rule 9(b); (c) the Liquidating Trustee has failed to plead a Section 18 claim; and (d) the Liquidating Trustee has failed to plead a claim of professional malpractice. With respect to each of these issues, RSM adopts and incorporates herein the substantive legal arguments presented in M&P's Motion to Dismiss that was filed with the Court on May 26, 2006 [C.P. # 11].

WHEREFORE, RSM McGladrey, Inc. respectfully requests that this Court enter an order dismissing the Liquidating Trustee's adversary complaint with prejudice, and granting such further relief as the Court deems just and proper.

ATTORNEY CERTIFICATION

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

Respectfully Submitted,

AKERMAN SENTERFITT
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By: /s/Philip J. Landau
Marc J. Gottleib
Florida Bar Number: 827819
Philip J. Landau
Florida Bar Number: 0504017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 21st day of June, 2006 by U.S. Mail to all parties on the attached Service List.

/s/Philip J. Landau
Philip J. Landau

APPENDIX I

UPDATE: Acctg Firm Sued On Securities Law Violation Charge Dow Jones News Service
April 14, 2006 Friday

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Newswires
Dow Jones News Service

April 14, 2006 Friday 6:57 PM GNT

LENGTH: 233 words

HEADLINE: UPDATE:Acctg Firm Sued On Securities Law Violation Charge

BODY:

Dow Jones Newswires

The accounting firm of McGladrey & Pullen is the target of a lawsuit alleging the firm violated federal securities law, and also accusing it of malpractice and fraudulent misrepresentation.

The plaintiff, Miami attorney Warren Trazenfeld, said McGladrey wanted to treat an acquisition by Stratesec Inc. as a straight purchase, but Stratesec threatened to sue the firm unless it used the "pooling of interest" accounting treatment.

Trazenfeld said McGladrey conducted a review and concluded a "pooling of interest" would not be appropriate, resigned as auditor and falsely stated it did not have an accounting matter dispute with Stratesec.

In a press release, Trazenfeld referred to McGladrey as an affiliate of H&R Block (HRB). However, a spokesman for H&R Block told Dow Jones that the accounting firm is a partner-owned national CPA firm that isn't affiliated with Block. He said McGladrey & Pullen has a complementary strategic relationship with RSM McGladrey, an H&R Block affiliate, but that the two firms are separate and independent legal entities.

The suit was filed in the U.S. Bankruptcy Court for the Southern District of Florida.

Stratesec, which went into bankruptcy April 28, 2004, is no longer in operation.

A McGladrey representative couldn't be immediately reached for comment.

-Dorna Naseri; 201-938-540; AskNewswires@dowjones.com
[04-14-06 1457ET]

NOTES:
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APPENDIX J

See Fold-Out Exhibit

Status of RSM International Trademark Application by McGladrey & Pullen

RSM
international

Word Mark	RSM INTERNATIONAL
Goods and Services	(ABANDONED) IC 035. US 100 101 102. G & S: business and account auditing, accounting services, tax management consulting, and business planning and consultation. FIRST USE: 19930100. FIRST USE IN COMMERCE: 19930100
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters
Serial Number	74583259
Filing Date	October 7, 1994
Current Filing Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) McGladrey & Pullen composed of Duane Tyler, Robert Jensen, Leroy Martin, James Blayney, John Bryant, Larry Dowell, Joe Gevock, Mark Scally, Dick Letsche and Larry Bildstein, all U.S. citizens PARTNERSHIP ILLINOIS 102 West Second Street Davenport IOWA 52801
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	James C. Nemmers
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "INTERNATIONAL" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	DEAD
Abandonment Date	August 5, 1998

Supreme Court, U.S.
FILED
OCT 24 2006
OFFICE OF THE CLERK

No. 06-197

IN THE

Supreme Court of the United States

MCGLADREY & PULLEN, LLP,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY BRIEF

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October 24, 2006

* Counsel of Record

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On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY BRIEF

Respondent devotes little attention to the criteria this Court applies when determining whether to grant certiorari. That is because this Court's traditional considerations clearly support review here. Respondent does not dispute that there is no way to square the decisions below with the New Hampshire Supreme Court's decision in *Appeal of Sutfin*, 693 A.2d 73 (N.H. 1997). Opp. 19. Respondent does not dispute that a plurality of this Court in *Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 108 (1990), concluded that *de novo* review is appropriate for commercial speech questions in cases arising out of state professional regulatory board proceedings. Opp. 11-12. And respondent only superficially attempts to distinguish numerous other cases in both the state supreme courts and this Court, all of which apply *de novo* review to a decision of a state professional regulatory board that restricts speech. Whether

courts will play a meaningful role in protecting speech rights through *de novo* review in such cases is an important question, the answer to which will determine whether speech rights are consistently enforced throughout the nation. Certiorari is warranted here.

The bulk of respondent's legal analysis is devoted to defending the propriety of substantial evidence review here. Those arguments only further support this Court's intervention because they demonstrate that the argument for substantial evidence review depends on the disturbing expansion of this Court's decisions in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and *Friedman* v. *Rogers*, 440 U.S. 1 (1979). In the end, respondent's position rests on a hostility to commercial speech rights nowhere to be found in this Court's decisions.

The balance of the Brief in Opposition argues that this is an inappropriate case to review the question, largely because petitioner's proposed name change could not survive even *de novo* court review. But respondents ignore the conspicuous fact that petitioner's competitors have likewise adopted brand-name designations that they share with distinct entities that provide non-attest services that their clients desire. There is no indication that anyone in North Carolina or anywhere else has been deceived or confused by the KPMG, BDO, Deloitte or Ernst & Young brands being applied to a variety of entities. Likewise, there is no reason to believe that anyone will be deceived or confused when petitioner changes its name to associate itself with the RSM brand.

1. Certiorari is appropriate to clarify the standard of review in cases arising from a state professional regulatory board decision to restrict commercial speech. In *Peel*, a plurality of this Court declared that in cases arising from decisions of state professional regulatory boards that limit First Amendment rights: "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this

Court should exercise *de novo* review." 496 U.S. at 108. Respondent rightly points out, as petitioner itself acknowledged, that this critical statement appears in a plurality opinion. Opp. 11-12. That fact only highlights the need for this Court to declare, clearly and authoritatively, whether the *Peel* plurality's position that *de novo* review is required reflects how commercial speech should be protected under the First Amendment.

Petitioner argued that the view of the plurality in *Peel* reflects this Court's practice, both before and since *Peel*. In cases like *Edenfield* v. *Fane*, 507 U.S. 761 (1993), *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985), *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), this Court performed independent, nondeferential review of the record in cases involving commercial speech restrictions imposed by professional regulatory boards. Petitioner also pointed out that these commercial speech decisions were consistent with the approach to free speech protection outlined in other cases. Pet. 19-21. Petitioner further identified a number of state supreme court decisions, including not only *Sutfin* from New Hampshire, but also decisions from Pennsylvania, Iowa and Alabama, that clearly state that *de novo* review is required when a party raises a First Amendment challenge to state agency or board action. *Id.* at 13-14.

Respondent makes no attempt whatsoever to reconcile the independent review conducted by the New Hampshire Supreme Court in *Sutfin* and this Court in *Edenfield*, *Zauderer* and *Ibanez* on the one hand with the North Carolina courts' decisions to conduct substantial evidence review here. The conflict on such a fundamental and recurring speech issue plainly warrants review. Further, respondent's effort to distinguish the various other cases demonstrates how far this Court's free speech cases must be bent to support a rule adopting substantial evidence review.

Respondent points out that several cases relied upon by petitioner involve First Amendment rights outside the commercial speech context. Opp. 13, 19-20. Emphasizing that this Court has established a lower *substantive* standard for evaluating restrictions on commercial speech,[1] respondent argues that the courts should also engage in more *deferential review* of the record in such cases. *Id.* at 13-15, 20. In short, respondent is arguing that cases applying *de novo* review of the record outside the commercial speech context have no application to this commercial speech case.

Respondent's effort to defend the North Carolina courts' decision to apply substantial evidence review only underscores the propriety of this Court's review to protect against the unwarranted contortion of this Court's free speech decisions. There is no dispute that *Central Hudson* establishes the applicable substantive standard in commercial speech cases. What is at issue here is the extent to which a court should independently review the factual record to determine whether that substantive standard has been met. Respondent's defense of deferential review thus depends on a radical extension of *Central Hudson*'s treatment of commercial speech. It is one thing to say that commercial speech restrictions can be justified on a showing of a lesser state interest. It is quite another to say that judicial review of the required showing will be deferential for commercial speech cases and *de novo* for other cases. Respondent relies on *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 635 (1995), which states that commercial advertising receives "a lesser degree of protection under the First Amendment." *Id.*; Opp.

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[1] The government may lawfully restrict commercial speech based upon a showing that the restriction is designed carefully to advance a substantial state interest. *Central Hudson*, 447 U.S. at 564. With respect to other expressive conduct, the government must demonstrate that the restriction advances a compelling state interest by the least restrictive means. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

15. But as that decision makes clear, a court can apply a lesser substantive standard, even as the court engages in a "scouring [review of] the record" to ensure that the standard is met. 515 U.S. at 628.

Further, the fact that the speech at issue in this case was found by respondent to be "deceptive," and thus entitled to no First Amendment protection at all, is significant. Pet. App. 8a; *Central Hudson*, 447 U.S. at 563. This case, like the various cases cited in the petition discussing obscenity or incitement of unlawful action, Pet. 20-21, involves drawing the line between protected and unprotected speech. This Court has consistently insisted that that line must be drawn by a court. *Id.* at 19-21. Respondent's defense of the North Carolina courts' application of substantial evidence review would create an exception for commercial speech cases: the line between protected and unprotected commercial speech would be drawn by various state professional regulatory boards, bodies which lack experience with free speech issues and whose members potentially possess interests in suppressing the commercial speech of competitors.[2] Whether respondent or petitioner is right is ultimately a matter for this Court to decide on the merits. What matters now is that the question whether this Court's decisions ensuring *de novo* judicial review of the record in cases drawing the line between protected and unprotected speech should be abandoned when commercial speech is at issue merits this Court's review.[3]

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[2] Respondent misunderstands petitioner to be belatedly arguing that the Board was biased. Opp. 9-10. Petitioner's point is one of institutional capacity, not bias in this particular case. A general rule permitting deferential review in these cases is inappropriate because state professional regulatory boards have no expertise with free speech principles and may be influenced by anti-competitive interest.

[3] Respondent's argument that Congress has delegated certain powers to state accounting boards, Opp. 27-28, ignores the fact that none of those acts transfers the responsibility for protecting the *constitutional rights*

Respondent's assertion that *Friedman* v. *Rogers*, 440 U.S. 1 (1979), answers the question presented similarly reflects a dramatic extension of what that case actually held. It is true that *Friedman* is a case involving this Court's review of allegedly deceptive trade names. But, contrary to respondent's suggestion, Opp. 20-21, *Friedman* takes no express position on whether a court should engage in *de novo* review of whether a trade name is deceptive. In fact, after concluding that the prevention of deception is a government interest that would support prohibiting commercial speech, this Court carefully reviewed the record, including deposition testimony and prior examples of deceptive behavior, to conclude that it was "well demonstrated" that the trade names at issue were deceptive. *Friedman*, 440 U.S. at 13-15. The optometrists in *Friedman* received far more court review of the record than did petitioner here. Indeed, the court satisfied itself that optometrists in Texas, including one of the parties before it, had frequently used trade names to deceive the public. Petitioner has not had the benefit of the same level of court review. In any event, respondent's argument that *Friedman* creates a trade-name exception to what numerous other cases suggest should receive *de novo* review only further underscores the need for this Court's review to clarify the scope of its prior decisions.

2. This is an appropriate case for this Court to determine whether de novo *review should be applied to state professional regulatory board decisions restricting commercial speech.* Respondent offers various thinly reasoned grounds for rejecting review in this case. None should prevent this Court from granting certiorari.

Almost in passing, respondent argues that petitioner failed to seek *de novo* review in the North Carolina courts. Opp. 28. That is false. In its briefs in every court, petitioner asserted

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of anyone, including accountants, from its traditional home in the courts.

that it was entitled to *de novo* review of the factual basis for the Board's ruling. The issue has been properly preserved for this Court's review.[4]

Respondent also asserts that because petitioner sought a declaratory ruling from respondent that it was entitled to change its name, petitioner bore the burden of proof to establish that its name was not deceptive. Opp. 7-8. But who bore the burden of proof before the Board is irrelevant. The fact is that the Board concluded that petitioner's proposed name was deceptive. Pet. App. 22a. When petitioner challenged that ruling, the courts reviewed the record to determine whether the Board's decision was supported by substantial evidence. *Id.* at 8a, 17a-18a. Petitioner questions the propriety of the North Carolina courts' deferential review of the record, and contends that it is entitled to change its name unless the record reveals that its proposed name is, in fact, deceptive. Petitioner asks this Court to hold that *de novo* review of the record is compelled under the First Amendment.[5]

Respondent devotes substantial space in its opposition to its claim that petitioner's proposed name is, in fact, deceptive, and that the Board's ruling could survive *de novo* review. Opp. 16. Respondent makes the point in various forms. For example, respondent summarizes the evidence it presented to justify its finding, almost all of which was presented for the first time in court, not during the administrative proceeding.

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[4] Respondent also asserts that petitioner's failure to note the undisputed and indisputable fact that the First Amendment has been applied to the states through the Fourteenth Amendment is "perhaps fatal" to the petition. Opp. 3, 18-19. Given that the interpretation of the Fourteenth Amendment is not at issue in this case, it is difficult to understand what respondent is arguing.

[5] In any event, it "is well established that '[t]he party seeking to uphold a restriction carries the burden of justifying it.'" *Edenfield*, 507 U.S. at 770 (alteration in original) (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)).

Id. at 5-7. But repetition of that evidence does not make it any more compelling. For the reasons stated in the petition, the evidence in the record, including the evidence introduced for the first time in court in an effort *post hoc* to justify the Board's finding, falls far short of establishing that petitioner's proposed name is deceptive. Pet. 9-10, 25-30.

Respondent simply ignores the most salient reason to doubt that petitioner's proposed name is deceptive to the public. Petitioner's proposed name change is a particular instance of a broad industry trend. The RSM brand that petitioner seeks to incorporate into its name and share with other non-attest companies is no more likely to deceive the public than other well-recognized brands like KPMG, BDO, Deloitte, and Ernst & Young, all of which are incorporated into the names of various attest and affiliated non-attest entities.[6] If respondent is right on the merits, then there must be widespread confusion in the industry. Before a court reaches such an improbable conclusion, it should insist on at least *some* evidence in the record that *anyone* has been confused by attest firms incorporating such brands into their names. Yet there is no such evidence here.

Respondent goes further in its effort to justify the Board's decision on the merits, arguing that a trade name conveys no useful information and therefore warrants no First Amendment protection. Opp. 10-11. Common sense suggests otherwise, given the substantial sums that firms

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[6] Respondent argues that petitioner is trying to have its cake and eat it too by arguing here that it is affiliated with other RSM entities, but arguing in an unrelated proceeding that it is a "'distinct legal entit[y]'" from RSM McGladrey, Inc. Opp. 25. But there is no inconsistency. Even such closely related entities as sister corporations are "distinct legal entities" despite the affiliation between them. Moreover, respondent twice misquotes the petition as reflecting petitioner's desire to "'better inform the public of its affiliation with' RSM McGladrey," *id.* at 24 (emphasis omitted), when the petition actually states that the affiliation is with *RSM International*. Pet. 5.

invest in branding themselves and the substantial literature explaining the way a brand efficiently communicates critical attributes to potential customers. Pet. 5-8. This Court has itself recognized that a trade name "acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality." *Friedman*, 440 U.S. at 12. Contrary to respondent's suggestion, petitioner does not seek to employ "the RSM initials [to] help the public identify Petitioner as a firm specializing in attest services." Opp. 11. The phrase "Certified Public Accountants," which is part of petitioner's proposed name, would accomplish that. The use of the RSM brand communicates adherence to the high standards of RSM International ("RSMI") and access to the international resources of RSMI affiliates.[7] This is precisely the kind of information the public should have available to it.[8] Indeed, as *Friedman* noted, "the trade name is used as part of a proposal of a commercial transaction." 440 U.S. at 11.

In the end, petitioner has been denied the right to communicate that it is affiliated with, and lives up to the

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[7] Respondent notes that Salustro Reydel, the source of the "S" in "RSM," has left the organization. Opp. 3. But this late-submitted fact is irrelevant. The RSM brand has significance independent of its particular affiliates. Those who choose to affiliate with RSM, and demonstrate to the satisfaction of the owner of the RSM brand (RSMI) that they meet the high standards of the organization, display the RSM brand to communicate those facts to potential clients.

[8] It is no answer that petitioner could advertise its affiliation in its letterhead. Opp. 11, 29. The North Carolina courts did not justify the Board's decision on the ground that the Board has allowed petitioner to communicate its affiliation in alternative ways, but instead concluded that substantial evidence supported the conclusion that the proposed name is unprotected speech because it is deceptive. In any event, petitioner, like several of its competitors, seeks to avail itself of the uniquely powerful communicative effect of incorporating the RSM brand into its name. It should be permitted to do unless the evidence in the record, reviewed *de novo*, demonstrates that denying the name change would clearly advance some substantial government interest.

standards of, the international organization of RSMI and that unlike other RSM entities, it performs attest services within the United States. That denial is based on a finding that its proposed name is deceptive despite the paucity of evidence in the record to support the conclusion. *De novo* court review would preserve petitioner's right to brand itself and thereby contribute to the free flow of commercial speech that this Court has repeatedly recognized as vital to our economy.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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